No. 80-854

Supreme Court, U. S.
FILED
NOV 26 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

LEONARD J. KERPELMAN,

Petitioner,

vs.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

LEONARD J. KERPELMAN
2403 W. Rogers Avenue
Baltimore, Maryland 21209
(301) 727-8700

In Proper Person

4260
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 840-9494 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

QUESTIONS PRESENTED FOR REVIEW

I. Has an attorney who has been suspended from practice for two years under a new state "Disciplinary Code" and required to pay $9000 in "costs" before being permitted to resume, been denied Due Process under the Federal Constitution:

A. By the absolute failure of the Maryland Court of Appeals, by apparent neglect, to rule upon the Petitioner's most important exception to the findings of the master, namely, the effect of an invoice clearly designating the agreement between the attorney and client as a retainer agreement. The Maryland court refused to correct its oversight by granting a rehearing when the omission was called to its attention by a motion for reconsideration. The effect of the invoice in question is to provide complete exoneration on two of three charges.

Also, the court delegated its justiciating function to only one of its

seven members.

B. By the creation of a new type of court proceeding, or court, which

1. is applicable to practicing attorneys only, provides no checks or balances, and entirely fails to provide elemental Due Process safeguards.

2. refers its proceedings to a "master" or "examiner" without the consent of the defendant.

3. provides by explicit rule that no defect in "procedure" can be claimed as error, and matters of substance are called procedure.

4. holds proceedings pursuant to a "clear and convincing evidence" rule, but exceptions to the master or examiner's findings will not be reversed except "where clearly erroneous," thus swallowing up the clear and convincing evidence rule, and making it ineffective; such interpreta-

tion of "clear and convincing" is in conflict with USCCA constitutionally based interpretation.

5. All of which is in complete opposition to Article IV of the Maryland Constitution, which by setting up a specifically enumerated number of courts and proceedings, which do not include this court or proceeding, has constitutionally defined Due Process in a manner which would be persuasive to this Court.

C. By, in effect, requiring conviction by something far less than "clear and convincing evidence" when such a standard is constitutionally required by federal Circuit Court of Appeals decision in conflict with Maryland decision.

D. By the provision of an appeal by way of "exceptions" only, which is not a Due Process appeal but is arbitrary and limited.

E. By the usurpation by the Court of Appeals of the right to define courts and proceedings which is a right reserved to the people by Article IV of the Maryland Constitution.

F. By conviction of an attorney for ethical violations upon the mere uncorroborated testimony of a disgruntled client.

G. By conviction of an attorney for an ethical violation, over what was clearly a bona fide fee dispute only.

H. By the court adopting an unwarranted inference that the Petitioner had on other occasions not part of the charges here, advised clients to disregard a court order. There was no such substantive evidence in the case.

I. By a finding that the attorney was guilty of this overbroad "violation": "A lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law."

J. By being subjected to a forfeiture of $9000 as a condition of resuming practice.

II. Has the Petitioner been denied Equal Protection of the Laws by being subjected to a type of proceeding not applicable to any other member of the population?

III. Has the Petitioner been denied his right to a trial by jury in derogation of the Fifth, Seventh, and Fourteenth Amendments to the federal Constitution?

IV. Are First and Fourteenth Amendment rights violated by conviction of an attorney for an ethical violation consisting of allegedly advising a client, in an emergency situation, to rescue his young daughter from danger and abuse and the company of an accused burglar-rapist, although custody had some time before been awarded to the child's mother who then took up living with the accused person, without any evidence showing any imminent threat to the administration of justice?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i - v
Reference to Reports	1
Grounds for Invoking the Jurisdiction of this Court	2
Constitutional Provisions, Statutes and Regulations	2 - 3
Statement of the Case	3 -10
Argument	
The Bill	10 - 17
Delegation of Decision-Making Function	17
Due Process Invalidity of Non-Consensual Reference to a Master	18 -22
Usurpation of Constitutional Authority to Establish New Courts or Forms of Trial as Denial of Due Process...	22 - 26
Lack of Checks and Balances; a Monolithic Danger	26 -27
Reductio ad Absurdum	27 - 29
Conflict with Legislative Act	29
An Inference Entirely Unwarranted	29A - 29B

TABLE OF CONTENTS CON'T

	Page
Denial of Due Process by Failure to Properly Observe the "Clear and Convincing Evidence" Standard; a Conflict of Interpretation of that Standard With a Federal Court of Appeal	30 - 31
Whatever the Clear and Convincing Standard Means, It Was Misapplied in the Malcomb Matter so as to Deny Due Process	32 - 36
Monetary Penalty; Bill of Attainder? It is Violative of Due Process	36 - 38
Draper and Cocaine	38
Jury Trial?	38 - 41
Petitioner was Convicted of a Violation of a Fatally Overbroad Prohibition	41 - 42
It is a Denial of First Amendment Rights Made Applicable to the States by the Fourteenth to Unreservedly Prohibit an Attorney to Advise a Client to Disobey a Civil Court Order	43 - 47
Conclusion	47 - 53

TABLE OF CITATIONS

Cases

	Page
Attorney Grievance Commission of Maryland v. Leonard J. Kerpelman	1
Craig v. Harney, 67 S.Ct. 1249, 331, U.S. 367,91 L.Ed. 1546	45
Day v. Sheriff of Montgomery County, 162 Md. 221, 159 A. 602 (1932)	25
Heaps v. Cobb, 185 Md. 372, 45 A.2d. 73 (1945)	25
In re Fisher, 179 F.2d 361 C.A. Ill. (1950)	13,53
In re Winship, 397 U.S. 358, 370. 90 S.Ct. 1068. 1076, 25 L.Ed. 2d., 368 (1970)	31
Kerner v. Fisher, 71 S.Ct. 59, 348, U.S. 825, 95 L.Ed. 606.	53
Kimberly v. Arms, Ohio, 95 S. Ct. 355, 129 U.S. 512, 32 L.Ed. 764	20
Malloy v. Hogan, 378 U.S. 1	40
Marbury v. Madison	49
Murray v. Curlett	50

Cases Con't

Porter v. State, Md. App. A.2d, (decided November 7, 1980) Moylan, J. 24

Shepard v. Maxwell, 86 S.Ct. 1507, 384 U.S. 333, 16 L.Ed. 2d 600 45

Spevack v. Klein, 87 S.Ct. 624, 385 U.S. 511 ..... 28,29,38, 39,51

Terrazas v. Vance, 577 F. 2d 7 ..... 30,31, 37

U.S. Lovett, 328, U.S. 303 (1946) 42

Woelfel v. State, 177 Md. 494 (1939) 24

Wood v. Georgia, 82 S.Ct. 1364, 370 U.S. 375, 8 L.Ed. 2d 569 45

Statutes and/or Constitutional Provisions

Article 1, Section 4, U. S. Constitution 42

Article 10 Section 10, Annotated Code of Maryland (Michie 1950). 3

Article IV., Maryland Constitution iii,iv,3, 26

Statutes and/or Constitutional Provisions Con't

	Page
Bill of Attainder	36,42
BV Rules, Vol. 9B	3
BV Rule 10d	30
Due Process, U. S.Constitution ..	i,ii,iii, 3,4,8,10,11, 15,16,17,19, 24,26,27,28, 29,29A,30,31, 32,36,38,42, 46,51,52
Equal Protection of the Laws	v
Fifth Amendment, U. S. Constitution	v,3,10,27, 38,39,40
First Amendment, U.S. Constitution (Free Speech Clause)	v,2,9,43
Fourteenth Amendment, U.S. Constitution.....	v,3,27,39, 43
Maryland Code, Article 10 ¶ 15 (MIchie 1957)	29
Maryland Declaration of Rights, Article 27	42
Seventh Amendment, U. S. Constitution	v,3,39,40, 41

Statutes and/or
Constitutional Provisions
Con't

Page

Title 28 USCA ¶ 1257 (3)..... 2

Texts

30 A. CJS Equity, Section 522.... 19

TABLE OF CONTENTS OF
APPENDIX

	Page
Judgment sought to be reviewed	1A
Order on rehearing requested.....	3A
Bill showing "retainer"	5A
Respondent's 15th Exception	6A
Respondent's 27th Exception	7A
Respondent's 29th Exception	8A
Respondent's 30th Exception	9A
Respondent's 34th Exception	10A
Maryland Constitution Article IV	11A
"BV Rules" Vol 9B "Rules of the Court of Appeals of Maryland"	12A
Maryland Declaration of Rights Article 27	16A
Annotated Code of Maryland Oath of Attorneys At Law Article 10, §10	16A

TABLE OF CONTENTS OF
APPENDIX CON'T

Constitution of the United States
Article 1, Section 9 ..... 17A
Amendment I 17A
Amendment V 17A
Amendment VII 18A
Amendment XIV 19A

Baltimore Sun Editorial 20A

Judgment Sought to be
Reviewed

IN THE COURT OF APPEALS OF MARYLAND

Miscellaneous Docket
(Subtitle BV)

No. 1

September Term 1979

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND

vs.

LEONARD J. KERPELMAN

...Leonard J. Kerpelman shall stand suspended from the practice of law in this state for the period of two years accounting from thirty days from the date of this opinion. He shall stand suspended beyond that date unless and until all costs incurred in connection with this proceeding are paid in full.

It is so ordered, Respondent shall pay all costs as taxed by the clerk of this court, including the costs of all transcripts pursuant to Maryland Rule BV15c for which sum judgment is entered in favor of the Attorney Grievance Commission against Leonard J. Kerpelman.

Filed: September 5, 1980

Order on Rehearing Requested

IN THE COURT OF APPEALS OF MARYLAND

Miscellaneous Docket
(Subtitle BV)

No. 1

September Term 1980

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND

VS.

LEONARD J. KERPELMAN

ORDER

Upon consideration of the motion for reconsideration filed in the above entitled case, it is this 26th day of September, 1980,

ORDERED, by the Court of Appeals of Maryland, that the motion for reconsi-

deration be, and it hereby is, denied.

Robert C. Murphy
Chief Judge

Filed: September 26, 1980

Bill Showing "Retainer"

STATEMENT

LEONARD J. KERPELMAN
ATTORNEY AT LAW
1303 STANDARD OIL BUILDING
BALTIMORE, MARYLAND 21202
PHONE 727-8700 OR 367-3055

DATE 1/16/76

Mr. John D. Malcomb
218 Parkholme Circle
Reisterstown, Maryland 21136

DETACH AND MAIL WITH YOUR CHECK. YOUR CANCELLED CHECK IS YOUR RECEIPT

DATE REFERENCE	CHARGES	CREDITS	BALANCE
BALANCE FORWARD →			
Further retainer	$1,000.00		
Paid 12/16/75		$500.00	$500.00

RESPONDENT'S 15TH EXCEPTION
EXERPTED FROM RESPONDENT'S
"EXCEPTIONS"

* * *

No. 15:

Levin ignored the existence and receipt, as a matter of law, of the bill of January 16th which clearly set forth that the fee paid by Malcomb and the fee paid by Draper were each "retainer" fees, and thereby refuted any evidence that the arrangement in the cases was a "flat fee" arrangement; the January 16th bills were nowhere explained by Levin.

RESPONDENT'S 27TH EXCEPTION
EXCERPTED FROM RESPONDENT'S
"EXCEPTIONS"

* * *

No. 27:

As to Draper, the Record contains a clear inference that he was under the influence of cocaine when he testified before Levin; as a matter of law an attorney cannot be found guilty for a disciplinary violation upon the testimony of one under the influence of cocaine.

RESPONDENT'S 29TH EXCEPTION
EXCERPTED FROM RESPONDENT'S
"EXCEPTIONS"

* * *

No. 29:

The witness Draper testified in the case, and then after suspicions were aroused on the part of the Respondent, an Interrogatory was submitted to him asking whether he was on cocaine at the time he testified. Draper took the Fifth Amendment. Levin refused to strike the testimony. Levin accepted the word of Draper as to what had happened over the word of Kerpelman. This exception is that as a matter of law an attorney may not be found guilty under a "clear and convincing proof" test where the only evidence against the attorney is the uncorroborated testimony of a person who took the Fifth Amendment as to whether he was under the influence of cocaine when he testified.

RESPONDENT'S 30TH EXCEPTION
EXCERPTED FROM RESPONDENT'S
"EXCEPTIONS"

* * *

No 30:

The averments of exception 29 are hereby adopted by reference: Levin's refusal to strike Draper's testimony was severe and substantial error.

RESPONDENT'S 34TH EXCEPTION
EXCERPTED FROM RESPONDENT'S
"EXCEPTIONS"

* * *

No. 34:

It is an abuse of, and a denial of Due Process to have the fact inquiry made by reference, in effect, to a master, and the question of disposition performed by this court; it is only in the course of a full-fledged fact finding inquiry that the true context, coloration, background, and proper inferences relating to disposition can be acquired; the procedure being used here is therefore invalid.

MARYLAND CONSTITUTION

* * *

ARTICLE IV

JUDICIARY DEPARTMENT

Part 1--General Provisions

Section 1. Judicial power vested in enumerated courts; courts of record; seals.

The Judicial power of this State shall be vested in a Court of Appeals, and such intermediate courts of appeal as shall be provided by law by the General Assembly, Circuit Courts, Orphans' Courts, such Courts for the City of Baltimore as are hereinafter provided for, and a District Court; all said Courts shall be Courts of Record, and each shall have a seal to be used in the authentication of all process issuing therefrom. (1966,c. 10, ratified Nov. 8, 1966; 1969, ch. 789, ratified Nov. 3, 1970; 1977, ch. 681, effective Nov. 7, 1978.)

"BV RULES"
Vol 9B
"Rules of the Court of Appeals of Maryland"
Annotated Code of Maryland, Michie (1950)

* * *

Rule BV9. Charges

a. Who May File.

Charges against an attorney shall be filed by the Bar Counsel acting at the direction of the Review Board.

b. Where Filed and Heard.

Charges against an attorney shall be filed on behalf of the Commission in the Court of Appeals. The Court of Appeals by order may direct that the charges be transmitted to and heard in any court and shall designate the judges to hear the charges and the clerk responsible for maintaining the record in the proceeding.

c. Form.

The charges shall be in writing and shall be sufficiently clear and specific reasonably to inform the attorney proceeded

against of any misconduct charged and of the basis of any allegation that he is incompetent.

d. Service.

The Court of Appeals shall direct in each case the manner of service of a copy of the charges which shall be served together with the order of the Court of Appeals designating the court and panel of judges to hear the charges.

e. Pleadings.

1. Motion for Transfer.

Within fifteen days following the service of the order designating a court in which the charges shall be heard, the attorney charged may move in the Court of Appeals for a transfer of the hearing to another court. Action on the motion is in the discretion of the Court of Appeals. Filing the motion shall not stay the time

for answer to the charges. Procedure on the motion is governed by the applicable provisions of Rule 855 (Application for Order--Motion--Answer).

2. Time for Initial Pleading.

The attorney responding to the charges shall file his initial pleading in the court designated to hear the charges within fifteen days after the date of service of the charges upon him, unless a different time is fixed by the order of the Court of Appeals.

3. Subsequent Pleadings.

Subsequent pleadings shall be governed by and filed in the court designated to hear the charges within the times set forth in the applicabie provisions of Chapter 300 (Pleading) of these Rules pertaining to pleadings in equity.

(Amended May 5, 1976, effective July 1,

1976.)

Rule BV 10. Hearings.

a. Discovery--Same as in Civil Case.

Chapter 400 of these Rules governs the taking of depositions and discovery in the hearing of charges.

b. Procedural Defects.

The hearing of charges shall not be stayed or challenged by reason of any procedural defects alleged to have occurred prior to the filing of charges.

c. Number of Judges.

The charges shall be heard by not less than three (3) judges.

d. Hearings--Conducted as Civil Case.

The hearing of charges is governed by the same rules of law, evidence and procedure as are applicable to the trial of civil proceedings in equity. Factual find-

ings shall be supported by clear and convincing evidence.

* * * *

MARYLAND DECLARATION OF RIGHTS

Article 27.

That no conviction shall work corruption of blood or forfeiture of estate.

* * * *

ANNOTATED CODE OF MARYLAND
Oath Of Attorneys At Law

Article 10, § 10

§ 10.Form.

Every attorney or other practitioner at law shall in open court take and prescribe the following oath or affirmation: I do solemnly swear (or affirm) that I will at all times demean myself fairly and honorably as an attorney and pratitioner at law; that I will bear true allegiance to the State of Maryland, and support the laws

and Constitution thereof, and that I will bear true allegiance to the United States, and that I will support, protect and defend the Constitution, laws and government thereof as the supreme law of the land; any law or ordinance of this or any State to the contrary notwithstanding.

* * * *

CONSTITUTION OF THE UNITED STATES

Article 1, Section 9:

No Bill of Attainder or ex post facto Law shall be passed.

*

Amendment I:

Congress shall make no law . . . abridging the freedom of speech . . .

*

Amendment V:

(Rights of Accused In Criminal Proceedings)

No person shall be held to answer

for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*

Amendment VII:

(Trial by Jury in Civil Cases)

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall

be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

*

Amendment XIV:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Judicial 'Usurpation'

In a recent opinion in a murder case appeal, Judge Charles E. Moylan, Jr., of the Court of Special Appeals, complained that rules of the courts are having the effect of laws, which are only supposed to be written by elected legislators. He asks, "Why have . . . editorial writers . . . been so unalert to usurpation on the part of one branch of government to the sovereign prerogative of a coordinate branch of government?" He thought that was a rhetorical question, but he doesn't know editorial writers. We don't often pass up a chance to answer a question.

The answer is that we, like most other citizens, have not been aware that rules of procedure have in fact become the equivalent of legislative-written new law. We have been too busy complaining that judges' *decisions* are too often the equivalent of legislative-written new law. In fact, as we understand the case that provoked Judge Moylan's complaint, an opinion of the Court of Appeals requires the same outcome as the rule in question. (A murder defendant's trial conviction was overturned because police did not take him before a court commissioner promptly enough.)

Even if Judge Moylan is wrong on the case in question, he has performed a very valuable public service by calling the public's attention to the rule-making power of the Court of Appeals and to the impact of such rules. Technically the rule-making procedure is open to the public, but in fact neither the legislature nor the general public pays any attention or plays any role. The rules are written, reviewed and approved by a small, select group of lawyers and judges. That there is no public input is not so much their fault as it is that of the rest of us.

Judge Moylan's answer to his own question is that editorial writers, (and lawyers, legislators and others) have been unalert to judicial usurpation of the legislative function because "we have grown so used to deferring to the judicial branch at the level of interpreting the Constitution, where such deference is appropriate, that we have been lulled by habit into deferring to the judicial branch even at the sub-constitutional level, where such deferrence is dangerously inappropriate."

We believe that to be true. We also believe that tolerance for the almost complete insulation from public opinion that judges and the courts have traditionally enjoyed is coming to an end. Thoughtful complaints like Judge Moylan's are part of a growing general, national frustration with the pervasiveness of the judicial branch of government in everyday life. The New Right is more upset by court decisions thwarting laws and ordinances than it is by laws and ordinances. Almost every state has adopted some formal mechanism for reviewing the administration of justice. This year a federal law setting up an oversight mechanism for federal judges was enacted. The defeat of one sitting Supreme Bench judge here last spring, and the near-defeat of another November 4, are omens.

An independent judiciary is vital in a constitutional democracy. But there is such a thing as a too-independent judiciary.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

Reference to Reports

Attorney Grievance Commission of Maryland vs. Leonard J. Kerpelman, Md. , A.2d .

Grounds for Invoking the Jurisdiction of this Court

(i.) The judgment of the Court of Appeals of Maryland sought to be reviewed was rendered and entered on September 5, 1980; also the Order denying reconsideration dated September 26, 1980 (referred to in ii).

(ii.) An order respecting a re-hearing, by denying the Petitioner's Motion for Reconsideration was passed by the Court of Appeals of Maryland, dated Steptember 26, 1980.

...

(iv.) Jurisdiction to review the judgments in question is conferred by Title 28 USCA ℙ 1257(3).

Constitutional Provisions, Statutes and Regulations

1. U.S. Constitution

First Amendment (Free Speech Clause),

Fifth (Self-Incrimination, Due Process, Jury Trials in Criminal Cases),

Seventh (Jury Trials, Civil)

Fourteenth (Due Process)

The above are set out in the Appendix.

2. Article 10 Section 10 Annotated Code of Maryland, Michie (1950): Attorney's Oath of Office. In Appendix.

3. "BV Rules". Vol 9B, "Rules of the Court of Appeals of Maryland", Annotated Code of Maryland, Michie (1950). In Appendix.

4. Article IV. Md. Constitution on the Judiciary. In Appendix.

STATEMENT OF THE CASE

An attorney of over 30 years standing, with an unblemished record who had represented many unpopular clients and difficult causes, has been suspended from practice for two years and required to pay $9,000 in "costs" before

he can resume practice.

The new Maryland procedure in these cases is peculiar. The case is heard before a judge, but he serves as a "master" or "examiner" --which of these, is not clear --but it is the Court of Appeals which sits as a nisi prius court. It decides the matter itself in the first instance.

Exceptions may be filed to the report which the examiner renders. The Court of Appeals then holds oral argument on the exceptions, and passes down a judgment based on the report, after ruling on the exceptions.

The procedure itself, the Petitioner here contends, and argues hereafter, offends against fundamental Due Process. That federal question was raised by preliminary motion before the examiner's hearing, and by specific exception in Exception Nos. 34 and 36 addressed to the Court of Appeals; in addition, each of the other exceptions filed to the examiner's report was clearly a Due Process exception

but for one --which was an ex post facto law exception, but that is dropped.

The examiner's report finding the attorney guilty was rendered on the entirely uncorroborated testimony of two former clients testifying separately in unrelated cases. They did not corroborate each other. One stated in cross examination that he "lied when it was to his advantage" and was apparently refuted in an important respect by an invoice placed in evidence by the party who called him.

The other was apparently testifying while under the influence of cocaine.

Supposedly the standard of proof for conviction was by "clear and convincing evidence," but the phrase has never been measured in a Maryland case except by language used in a libel action and which is in apparent conflict with an interpretation of "clear and convincing" used in a federal

Circuit Court of Appeals decision. This court should resolve that conflict, it will be argued below.

Both of the complaining clients were fathers who had been sucessful in their difficult custody cases, but became complainants after they had been submitted modest bills by the attorney. These modest bills created some of the issues below.

John Malcomb's bill at the close of his case was $750 over and above the $1000 he had paid before. But he claimed the fee agreement was for a flat fee. The attorney testified that that could never be done in a custody case, that the $1000 first paid was a retainer only. The unrefuted evidence was that fairly promptly --three weeks after a portion of the $1000 was paid --Malcomb was mailed an invoice (Appendix P.) stating that the payment which had been made was on a "further retainer" (he had hired the Petitioner on a retainer six months before).

This invoice was actually offered in evidence by the Grievance Commission itself. Under all the cases, it is bound by its own evidence.

The Petitioner's 15th exception raised this point and that the bill, as a matter of law, refuted Malcomb's oral testimony that there was a flat fee arrangement; it made the point that as a matter of law the invoice made the proof against the Petitioner insufficient under a "clear and convincing proof" standard. It was an exceedingly important exception.

The Maryland court ignored --or there is evidence that it forgot --exception 15. It did not discuss it. Instead, it accidentally lumped it with exceptions pertaining to the bias of the examiner, and only said that the contentions "of bias and prejudice etc." of the examiner were without merit. (Opinion P.18). Nothing else.

The court was re-requested to rule by Petitioner's Motion for Reconsideration. It turned down the motion out-of-hand within a day; apparently by immediate return mail!

This was a most serious denial of Due Process --committed by what, under the procedure, is a nisi prius court --it was a denial of the right to be heard.

Exception No. 15 appears in the Appendix.

The Petitioner is in the unusual position that because no appeal is provided from the nisi prius court, he can only raise this issue of denial of Due Process here.

The second complainant was David Draper. His child had been taken off by his wife who had custody under a temporary Maryland Decree, and she moved into a New York slum area apartment with the child, to

live with a boy friend who was then an accused burglar-rapist and who, it was alleged, had abused the child by throwing her across the room.

While a petition to the Maryland court to change temporary custody was being prepared, Draper went to New York and got his child back.

He claimed it was done on the advice of the lawyer. The lawyer denied it, but nevertheless challenges here, the Free Speech and Right to Counsel constitutional validity of a "disciplinary rule" which prohibits an attorney advising a client to violate a civil court order.

Draper immediately left town after testifying, but because of certain suspicions he had aroused in the mind of a knowledgeable aide of the lawyer's he was further questioned (by both sides) by written interrogatories at a further deposition. He there claimed

the protection of the Fifth Amendment when asked "were you under the influence of cocaine when you testified before Judge Levin?"

The Petitioner moved before the examiner to strike Draper's testimony because of the cocaine question and answer on, clearly, Due Process grounds. This was refused. That refusal and the sufficiency to convict, of such tainted testimony, particularly under a "clear and convincing evidence" standard, were both challenged, again clearly as a matter of Due Process, before the Court of Appeals by Exceptions 27, 29 and 30. These were denied. The exceptions appear in the Appendix.

ARGUMENT

The Bill

Perhaps the most serious disregard

of the Petitioner's Due Process rights by the Court of Appeals, was a simple failure to rule on the effect of a document put into evidence by the Attorney Grievance Commission itself (called the Petitioner below, and therefore "Petitioner's Exhibit #3." See Appendix) and rule on whether the Grievance Commission was bound by it.

The Petitioner here had been accused below of "escalating" a fee by quoting to one John Malcomb an alleged flat fee for handling of his custody case and then later sending him an additional bill.

However, unknowingly, the Grievance Commission had offered into evidence the entire batch of bills which had been sent to Malcomb, and among these was the very first bill which he had been sent which referred to his initial payment in this matter as a "further retainer" (emph. supp.) (called "further" because he had been represented by this Petitioner about six months before and had paid an earlier retainer).

This bill, as has been said, was submitted by the Grievance Commission and, according to all authorities, it was bound by its own evidence, its own submission.

Neverhteless, it then sought to impeach its own evidence, which is likewise impermissible, see Wignore. It sought to imply that the bill was a recent manufacture, but presented not an iota of evidence to that effect. It sought to squirm out of its embarassment. To no avail. The bill was in, it is clearly authentic as any of the other bills, and Mrs. Ruth Williams, the elderly bookkeeper and billing clerk of the Petitioner testified unequivocally that it was an authentic bill and that she recalled the very time that it went out with some perhaps thirty other bills to other clients in the regular course of business.

There can be no question but that the bill was sent out in the regular course of business with other bills, as a matter of

course. Mrs. Williams' testimony was brief, appears in the transcript of the hearing indexed under "Ruth Williams" in the Record. "Every lawyer is entitled to the presumption that he is honest and acting in the best interest of those whom he is employed to represent..." In re Fisher, 179 F 2d 361 C.A. Ill (1950).

The matter of this bill was raised below by the Petitioner in his Exception No. 15.

Yet this clear and convincing evidence in the Petitioner's favor was absolutely not treated of by the Court of Appeals in its Opinion, but instead the court said (at P.28):

> "Kerpelman is in error when he suggests that the trial judge came to a'conclusion that Malcomb had been overcharged'. He reached no such conclusion. He determined, as we have earlier indicated, that Kerpelman represented to Malcomb that his total fee for represen-

> tation would be $1000 and no more, but that in violation of this agreement Kerpelman charged or attempted to charge Malcomb fees over and above the agreed upon amount (after the case was over), that Kerpelman made a willful misrepresentation to Malcomb as to the fee, and that Kerpelman maliciously and improperly escalated the fee charged to Malcomb without any basis, without any agreement, without any warning and without the escalated charges bearing any relationship to the amount of work done."

All of which the bill belies. Either the original charge was a flat fee or it was a retainer. The bill shows that it was a retainer. Also, the Commission was bound by its evidence. Apparently, being at a loss to explain how Malcomb could have been sent a bill which said "retainer" if in fact he had been "maliciously and improperly" charged an

additional fee at the close of the case, of $750, for the recovery of his child's custody, the court simply ignored the problem of the bill, did not discuss it. This, the Petitioner respectfully suggests, is a most egregious denial of Due Process.

The question of the "retainer" and the bill are specifically raised in Petitioner's Exception No. 15 in the Court of Appeals proceeding below; and it is clearly a Due Process exception:

> "Levin ignored the existence and receipt, as a matter of law, of the bill of January 16th which clearly set

> forth that the fee paid by Malcomb (was a)...'retainer' fee, ...and thereby refuted any evidence that the arrangement in the case was a 'flat fee'... The January 16th (bill was) nowhere explained by Levin."

The Court of Appeals entire and only treatment of Exception No. 15 is the following (at P.18 of its Opinion):

> "10-16 inclusive - alleged Bias, Prejudice, Etc., of Judge Levin.
>
> "These contentions are without merit."

That is all the court ever said of the question of the bill. Apparently, the bill so confounded the Court of Appeals that it could not face the task of treating of it. Or perhaps it was simply overlooked. But it is not permissable, constitutionally, to overlook a practicing attorney right out of business. That is a denial of Due Process.

So although the Maryland Court of Appeals purports to provide for review by way of exceptions, here, in this most impor-

tant exception, it provided no review and therefore the Petitioner was denied, completely, Due Process.

Delegation of Decision-Making Function

Incidentally, the Petitioner would now make the point that apparently the Maryland court clearly delegated its decision making function to Judge Smith, who wrote the Opinion. This is entirely, and it is respectfully suggested, irrefutably, clear from the fact that not one of the seven appeals court judges seems to have noticed the failure to rule on Exception 15. It is unmentioned by any. Fairness in Due Process requires that the judging function be performed; here it appears to have been delegated, as all seven would not have made the error and oversight of treating No.15 as a matter of "Bias, Prejudice, Etc. of Levin". The exception has nothing to do with any bias or any "etc," of Levin. It has to do with the bill alone, which is never mentioned in the Opinion.

Due Process Invalidity of Non-Consensual Reference to a Master

The objection of the Petitioner by Exception 34 concerning the case being referred to a master was turned down out-of-hand by an impatient court which merely flicked a figurative fly-whisk at the idea, as if constitutions were too tedious to be of real concern. The court's entire disposition:

> This is yet another of his contentions for which Kerpelman cites no authority. For generations, in proper circumstances (emph.supp) courts, state and federal, including the Supreme Court of the United States, have made use of masters who have heard the evidence after which the ultimate disposition has been made by the court. This contention is without merit.

The statement might be correct if both parties had consented. Cases will be cited in a moment. But the Petitioner had not consented. He had protested. His exception to the Court of Appeals was ex-

plicit: "It is a denial of Due Process to have the fact inquiry made by reference, in effect, to a master..." (Exception 34).

The court was entirely wrong in its opinion in assuming it had any right, given Due Process as a limitation, to use a master without consent. There is a unanimity of opinion, it is believed, that such procedure violates federal Due Process.

The Due Process invalidity of what the Maryland court did, is relatively simplistic encyclopedia law. 30 A. CJS Equity, Section 522, states in the headnote:

> "It is ordinarily not proper for the court to refer the whole cause to a master to determine all issues, except with the consent of the parties."

In discussing what might be a proper reference and what might not be,the CJS article goes on to say:

> It is ordinarily not proper for the court to abdicate its functions by referring the whole cause to a master to

try and determine all of the issues without the consent of one of the parties, but it may do so by consent of the parties." Citing the leading case of Kimberly vs. Arms, Ohio, 9 S.Ct. 355, 129 U.S. 512, 32 L.Ed. 764.

And which case, of this court, holds:

A master in chancery is an officer appointed by the court to assist it in various proceedings incidental to the progress of the cause before it, and is usually employed to state accounts, to take court testimony, and perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, the auditing and ascertaining of liens upon property, and similar services...

It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of the case to him without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon

> any of its officers. But a reference by consent of parties, of an entire case for determination of all its issues, though not strictly a submission of the controversy to arbitration... is a submission... to a tribunal of the parties' own selection..." (Emph. supp.)

Perhaps, however, the hearing official herein was a master not an examiner. He did make "findings of fact and conclusions of law." Willy nilly then, he could be a master.

Where then, was the consent? It did not exist.

In either case, disbarment, suspension, attorney discipline are exceedingly serious matters, too serious, to permit of involuntary submission to either a master or examiner.

This new procedure was adopted in Maryland, among the first states anywhere. It has since been adopted in others. At least six, it is believed, so far.

Presumably, since the master or examiner in the case is in fact otherwise a state circuit judge, the usual rules as to non-consensual reference will be said by the Respondent not to apply.

However, no cases so hold, it is believed, for disbarment or attorney discipline cases. These are not light matters similar to stating accounts, or appraising property.

The court should grant certiorari to settle this new and important question.

Usurpation of Constitutional Authority to Establish New Courts or Forms of Trial as Denial of Due Process

Recently, one of Maryland's own judges of the intermediate appellate level, spoke in a matter related to this case only indirectly. It was un cri de coeur. On November 7, 1980 this normally placid,

unemotional and conservative judge of the Court of Special Appeals, in as harsh a judicial pronouncement as memory serves ever to recall, castigated the Maryland Court of Appeals use and misuse of its rule-making authority in the criminal law areas as:

> "...(a)profound issue that desperately calls out for public attention, and public concern..."

He then called on the General Assembly of Maryland to take action against the Court of Appeals, and asked,

> "Why have bar associations, editorial writers[1] and concerned citizens been so unalert to usurpation on the part of one branch of government, of the sovereign prerogative of a coordinate branch of government?..."

The judge was so disturbed by this "usurpation", in fact, that in an unprecedented statement in the Opinion, he actually invited someone --anyone --to file a citizen's lawsuit challenging such misuse of

[1] See Baltimore Sun editorial which followed in Appendix.

the Court of Appeals' rule-making power!

--Concurring Opinion of Moylan, J., in Porter v. State, Md. App. , A.2d. , decided November 7, 1980.

Judge Moylan is respected as a fine and sensitive citizen and legal scholar. Apparently, if Judge Moylan is disturbed, something may be very much amiss, in a Due Process sense, where the Court of Appeals' exercises in rule-making are concerned. The problem is, that by its rule-making power, the Court of Appeals has created a new court and a new procedure, or trial form, --for lawyers only. It cannot do so.

> "The judicial power of this state (according to Article IV, Section 2 of the Constitution) shall be vested in a court of appeals, (the circuit courts), and justices of the peace," and there is no power in the legislature to provide for any other courts (emph.supp.) Woelfel v.State, 177 Md. 494 (1939).

If the legislature cannot create new courts or court systems, neither can

the Court of Appeals.

Casting further doubt on the procedure is the question of whether, having appointed a master, a sort of one-man administrative board, to do its work for it, the court has the right to leave his findings essentially unreviewable.

> "Administrative boards are not clothed with judicial authority, which the legislature has no power to confer upon them, and their decisions when they impair personal property rights are not irreviewable." Heaps v. Cobb, 185 Md. 372, 45 A.2d 73 (1945).

This Court is asked to note that the Court of Appeals adopts the master's finding unless "clearly erroneous" and there is no place to go on appeal. No place.

In Day v. Sheriff of Montgomery County, 162 Md. 221, 159 A. 602 (1932), the Court of Appeals held that an act creating a police justice for the town of Tacoma Park, to be appointed by the governor on the recommendation of the Mayor and Council of the town,

was invalid under Article IV, Section 2 of the state Constitution.

Lack of Checks and Balances; a Monolithic Danger

As has been said, contrary to its own cases, the Court of Appeals has attempted to do the very thing it has prohibited, that is, to create a new court, and a new form of court procedure bearing a further danger: that is the harshness and unchecked or balanced control of the procedural system. It cannot pass Due Process muster, it is believed.

It provides that the Court of Appeals approves certain "Inquiry Panels", that the panels shall act, that the Court of Appeals shall approve charges to be made by them, that the Court of Appeals shall appoint the prosecutors in the form of Grievance Commission staff, that the Court of Appeals shall appoint a master to conduct the hearing, that the master shall report his findings of fact and conclusion of law to the Court of

Appeals, and that the Court of Appeals shall act upon those findings. They also provide that no "procedural" errors may be taken advantage of by the defendant (BV 10b) and they state that the proof shall be by "clear and convincing" evidence only, but, as pointed out elsewhere, they do not define clear and convincing. A later definition, referred to herein in another section is -- mushy.

It is a monolithic and highly dangerous system.

--Both as an unlawful usurpation of constitutional power and as an unlawful procedural system, as it amounts to a denial of Due Process under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Reductio ad Absurdum?

Would it not be surprising to suggest that in a criminal case if a defendant waives his right to a jury trial that the court

would, over the defendant's objection, have the right to submit the matter to a master, and not bother to observe the witnesses, weigh the manner in which they testify, their demeanor on the stand, their bearing during cross-examination, and all of those concommitants of a trial which are purported to enable the tryer of fact to come to correct conclusions on inferences, credibility, and the weight to be accorded to various testimony?

The idea that a criminally accused could be relegated to a trial before a master who makes findings, or before a hearing examiner who reports back to the court, would be bizarre even in some lesser places in the world than the United States. It is suggested that to try an attorney in Maryland by such a means is no less bizarre and no less a denial of Due Process than to try a criminal that way.

Spevack v. Klein, 87 S.Ct. 626,

385 U.S. 511, permits our now sometimes desperate brotherhood to claim as its due at least that same consideration in the courts, as to constitutional guarantees, as others.

It is respectfully suggested that this Court should grant certiorari to further delineate the vitality of Spevack, particularly as to whether it prohibits a mere master's hearing to supplant a trial, in trying and convicting a lawyer.

Conflict with Legislative Act

Maryland Code Article 10 § 15 (Michie, 1957) provides by statute for grievance procedures against attorneys.

Apparently it was never repealed, yet by Rule issued February 10, 1975, the Court of Appeals purported to change the procedures to the present "master" or "examiner" procedures.

It would appear to be a violation of Due Process.

An Inference Entirely Unwarranted

The Petitioner was charged with advising one person only, Draper, to violate a court order.

Out of a clear blue sky, however, supported by no substantive evidence in the case whatever,the Court of Appeals baldly states, at the end of its Opinion, P.41:

> Although we may infer from the proceedings here that the Draper matter is not the first and only instance in which Kerpelman had advised self-help on the part of his clients, in disregard of a court order, such other instances may not be used in determining the sanction...

But its use in determining guilt has obviously, by the court's statement, not been excluded!

A breathtaking example of Due Process denied and abused, it is respectfully suggested.

Since there is no Maryland appeal, will not this Court grant certiorari?

The safety and independence of the bar is put at risk by such haphazard judicial conduct.

Denial of Due Process by Failure to Properly Observe the "Clear and Convincing Evidence" Standard; a Conflict of Interpretation of that Standard with a Federal Court of Appeal

It is stated that clear and convincing evidence is required in the proceedings (Rule BV 10d). In Terrazas v. Vance, 577 F.2d 7 it was held that this means that all ambiguities must be resolved in favor of the respondent. (P.12 bot. column 1).

The Maryland court admits that "clear and convincing" means something, but it does not say just what, other than, in the opinion, at P.19 to say that proof beyond a reasonable doubt "is a higher standard than proof by clear and convincing evidence as required in defamation cases..." How much lower a standard is not stated, nor is the "resolution of ambuiguities" test made the standard; instead one is simply left to conjecture as to how much lower than "beyond a reasonable

doubt": which is a conflict with the Terrazas holding.

The Maryland court's adoption of this apparently lower requirement might be permissible if there were no constitutional standard involved.

But the Terrazas case, at P.11 particularly,indicates that the "clear and convincing" requirement --if not, in fact, a "clear and convincing and unequivocal" requirement --arises out of Due Process constitutional considerations where an "individual's substantial interest" is at stake.

The Terrazas court quotes Justice Harlan, that "a standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of his factual conclusions for a particular type of adjudication". From In Re Winship, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed. 2nd., 368 (1970).

Whatever the Clear and Convincing Standard Means, It Was Misapplied in the Malcomb Matter so as to Deny Due Process

Judge Levin (the master) in his recommendation to the Court of Appeals cited one instance when Malcomb lied --in backdating his separation to get an earlier divorce --and said that apart from this, he found Malcomb's testimony to be consistent. But during the trial, in Malcomb's cross examination, it was also shown that Malcomb had in October 1976 misrepresented his situation to the Attorney Grievance Commission, and had made statements concerning the lawyer's representation which were not true, for example:

1. That he had had custody of two children and lost one, whereas his wife was in fact asserting her right to custody of both, and but for the attorney, Malcomb might well have lost both instead of gaining secure custody of one.

2. That the Petitioner never communicated with him during the trial.

3. That the Petitioner failed to use information he supplied.

Malcomb's statements concerning his ex-wife's discovery of some literature, used as her excuse to leave him, varied at different times, and disagreed with the wife's story. At various times he said:

1. She found it concealed in the cellar.

2. It was in the trash about to be thrown out.

3. It was old literature he had concealed and forgotten about.

4. It came in the mail.

5. A friend gave it to him.

It was repeatedly shown that Malcomb's memory was inaccurate.

Malcomb clung during the trial to the assertion that the Petitioner had promised him a "flat" fee, but he did not make

this allegation until October 1976, on the advice of an attorney hired to defend Petitioner's fee suit.which claimed a total fee for the whole case of $1850.

(The members of the Attorney Grievance Inquiry Panel all agreed that the amount originally billed was not in itself excessive or unreasonable; one of the local judges hearing the fee dispute stated that the value of services rendered was clearly greater than the fee paid, and explicitly stated that a grievance was not justified in the circumstances.)

Malcomb's own letter hiring the Petitioner asked what his "retainer" would be; later he tried to say that only $500 of the $1000 that he had paid by May 1976 was a retainer; that the rest paid before trial was the balance of the total fee. Not until 1979 did he deny getting Petitioner's bill of 1/16/76 which clearly identified the entire $1000 as a retainer. It was not dis-

puted that this bill was among the Petitioner's subpoenaed office records, and all the testimony was that it was sent in the ordinary course of business.

In early July 1976 Malcomb paid $50 on a bill for a "further retainer" of $650; he admitted he did not at this time make any protest about this bill or that it was a retainer but testified in 1979 that he concealed from the Petitioner that he did not intend to pay it. On July 29, 1976 Malcomb carried out his admittedly preconceived plan to not pay: he acheived this by asserting in a letter to the Petitioner of that date that Petitioner did not inform him promptly of a decision made by the judge in his custody case on 7/20/76 and that therefore no further payment to Petitioner was justified. He further alleged in this letter that the Petitioner told him, after 7/20/76, that the judge had not decided the case and that he was still working to affect the custody de-

but none are keyed to this formal charge of "any other conduct".

It is respectfully urged that the court consider granting certiorari on this point, as if this catch-all charge--never before ruled upon by this court --is valid, then Grievance Commissions have carte blanche to make their own determinations of propriety in an entirely unrestricted manner, and practicing attorneys will be completely at sea, without guidance of any sort.

Monetary Penalty; Bill of Attainder? It is Violative of Due Process

If conviction of a disciplinary violation is not a crime nor even a quasi-crime then the court is without any right to impose a monetary punishment, certainly so in the absence of any statute, and there is no statute. All that there is is the court's own usurpation of power by its rule-making, and it is only by its own self-made rule that it

cision.

The Petitioner denied that he had withheld information as to the proposed order of 7/20/76. He was, in fact then recommending challenge of the award of support payments for the child not placed in the father's custody. If it were not challenged, the order would have been passed. No evidence was brought forth, other than this client's unsupported word that Petitioner concealed this decision from the client. In view of the client's clear and freely expressed interest in avoiding payment of the fee, Petitioner argued that any doubt should be resolved in his favor, and argues that the contrary finding arises from a misconception of the Due Process requirement set forth properly in Terrazas: that all ambiguities in this entirely word-against-word confrontation, particularly in view of Malcomb's several contradictions and statement that he "lies when it is to his advantage",

should have been "resolved in favor of the Respondent (the Petitioner)" and so could not have produced a conviction on the Malcomb matter.

Draper and Cocaine

Exceptions 27, 29 and 30 should have been granted. Not to is a denial of Due Process, when quite apparently Draper was under the influence of cocaine while actually testifying (he interposed the Fifth Amendment when asked about it; thus in effect he was not cross-examined). His testimony should therefore have been stricken.

Or, as a matter of Due Process, should not have been sufficient to provide "clear and convincing evidence" against the attorney.

Jury Trial?

In light of this Court's decision in Spevack v. Klein, 87 S.Ct. 625, deter-

mination that attorney disciplinary proceedings impose a "penalty" which permits the protection of the Fifth Amendment right against self-incrimination to be interposed, does not the same logic permit the election of a jury trial in the same proceeding because of the fact that the proceeding seeks to impose a "penalty"; or alternatively under the Seventh Amendment as being a "suit at common law, where the value in controversy ... exceed(s) Twenty-Dollars,..."; is not the holding of the Maryland court denying a jury trial in conflict with Spevack?

This latter argument would avail the Petitioner only if this court wished to rule that the Seventh Amendment(civil jury trials) is made applicable to the States by the Fourteenth.

The Fifth Amendment provision against self-incrimination nowhere speaks of a "penalty" but only of a criminal prosecution; nevertheless in Spevack v. Klein, 87 supra,

this Court quoting Malloy v. Hogan, 378 U.S. 1, said: "In this context 'penalty' is not restricted to a fine or imprisonment. It means... the imposition of any sanction which makes the assertion of the Fifth Amendment privilege 'costly'." And the court held that the Fifth Amendment privilege applies to an attorney disciplinary proceeding.

Likewise, the logic is the same, and the Petitioner should have been entitled to a jury trial under the Fifth Amendment for the same reason that the effect of the proceeding was to impose a severe "penalty" upon him. The Petitioner had claimed the right to a jury trial from the very outset and it was a specific subject of Exception No. 1 which he filed in the Court of Appeals.

Alternatively, clearly the matter involves an amount in controversy greater than $20 and by the Seventh Amendment the Petitioner would have the right to a jury,

if the Seventh Amendment is applicable to the states.

Petitioner was Convicted of Violation of a Fatally Overbroad Prohibition

The Petitioner at P.38 of the court's opinion was found to have engaged in "any other conduct that adversely reflects on his fitness to practice law".

The charges were neither further defined, nor restricted by the facts in the case, in any way that is discernable in the court's opinion.

Therefore, the Petitioner has been found guilty of an overbroad charge (P.38, Opinion) which informed him of nothing concerning what it was he had to meet.

Some question is raised by the Grievance Commission's recitation in another part of the charge, of facts concerning a large general mass of dealings with the two clients,

claims the power to impose a monetary penalty of around $9000, mostly in "transcript costs", on the Petitioner's right to resume the practice of law.

The U.S. Constitution prohibits federal Bills of Attainder[2] by Congress (Art.I Sec. 4). Maryland also, by its Declaration of Rights Article 27 ("No conviction shall work corruption of blood or forteiture of estate.") does the same.

By analogy, it is respectfully urged, for the Court of Appeals to impose such a penalty not permitted by statute, is surely a denial of Due Process.

---

[2] Bill of attainder: An act, no matter what its form, that applies "either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial..." U.S. v. Lovett, 328 US 303 (1946)

It is a Denial of First Amendment Rights Made Applicable to the States by the Fourteenth to Unreservedly Prohibit an Attorney to Advise a Client to Disobey a Civil Court Order

Does the Court of Appeals of Maryland have the right to impose penalties and sanctions for advice given by an attorney

to a client? It is entirely disputed that the Petitioner ever advised any client to steal his child in violation of a court order.

But there is no dispute, that whatever discussion occurred between the attorney and client had to do with the safety of a young female child who had been taken to a New York slum by her mother, to live in company with an accused burglar-rapist, who was also alleged to have abused the child by throwing her across the room.

The Court of Appeals of Maryland was vehement in its opposition to such "contumacious advice.". (Opinion of the court pp .35,38,40,41)

The Maryland court is in conflict with numerous federal cases on the subject of punishment for contempt by words.

This is an area so close to the ancient and discredited criminal libel conception that discussion of it seems very

archaic. But nevertheless, in Wood v. Georgia, 82 S.Ct. 1364, 370 U.S. 375, 8 L.Ed. 2d 569, it was held to be impermissable to find the defendant guilty for speaking, unless the speech presented a "clear and present danger to the administration of justice", for "men are entitled to speak as they please in matters vital to them and although errors in judgment or unsubstantiated opinions may be exposed, they may not be exposed through punishment for contempt for the expression thereof."

To the same effect in Shepard v. Maxwell, 86 S.Ct. 1507, 384 U.S. 333, 16 L.Ed. 2d 600. In Craig v. Harney, 67 S.Ct.1249, 331 U.S. 367, 91 L.Ed. 1546 it was held that not only must the threat to the administration of justice not be remote, or even probable, but it must be such as would "immediately impel."

So if the court cannot prohibit, without a showing of clear and present

danger to the administration of justice, words which are claimed to constitute contempt of court, or contempt of a court order, then it seems that this court should state that it is a denial of Due Process to impose a penalty upon an attorney where no clear and present danger to the administration of justice has been shown or where it has not been shown that the conduct would "immediately impel" the administration of justice to be impaired.

On the contrary, all of the evidence in this case showed that the child in question was immediately brought before a Maryland court after it was returned, and the court rendered justice to the child as well as to the parents, and which court, itself, expressed no concern whatsoever that the activity of the father had constituted a threat to the administration of justice, an infringement thereof, or an impairment thereof. The only threat seems

to be to the rather royal feelings, to the majestic aura, which the Maryland court seems to be willing to place as an embellishment around itself.

It would be hoped that there would be some concern caused to this court when, in an area of delicate personal relationships and family problems, an attorney is subjected to severe censorship restrictions on what he may or may not discuss with a client.

The question of conversations relating to criminal activity do not arise in the context of this case whatsoever, of course.

CONCLUSION

Nicolo Sacco's "I am only a poor shoemaker..." speech and Bartolomeo Vanzetti's last speech to the court appear in many anthologies of American poetry. See

Untermeyer's for example. Although neither intended to be known as a poet, but rather thought of himself as a hardworking anarchist and labor agitator. Vanzetti's speech is a moving one as he throws his ideas into the teeth of the court:

> I found myself compelled to fight back from my eyes the tears and quanch my heart trobling to my throat to not weep before him. But Sacco's name will live in the hearts of the people when your name, your laws, institutions and your false god are but a dim rememoring of a cursed past in which man was wolf to the man.

They were not popular fellows, but they had no difficulty in being represented by one of the ablest of attorneys of the time: Michael Musmanno.

British soldiers accused in the Boston Massacre were represented by Samuel Adams. No problem.

Nobody retaliated against Adams or Musmanno. They went on to finer things.

Abe Fortas represented Gideon.

Louis D. Brandeis' clients before this court were many of them unpopular. Brandeis nevertheless managed to get by without being pounced upon, I believe.

In Marbury v. Madison, Marbury had no particular difficulty getting legal representation against a rather high public official.

One of the things that attracted this Petitioner to the practice of law after World War II, a most idealistic time, was its principled recognition that one of the high forms of service which an attorney could perform was to represent the downtrodden, the unpopular, the poor in public will, the distressed, the oppressed. Unpopularity of the clients' cause could theoretically do him no harm professionally. Wonderful.

It might be immodest for the Petitioner to say that thereafter, and over the

years, he had a tendency to carry outspoken advocacy of unpopular causes to something of an extreme. But though this might have been economically unwise, it was never dangerous. The Petitioner's record includes representing trees, socialists, swamps, beautiful buildings against parking lots and oil companies, and a rather extreme tendency also to take seriously his duty to complain about public officials when warranted. He was also involved in the School Prayer Case, representing the Petitioner, William Murray, in Murray v. Curlett, here.

Yet in thirty years, the Petitioner has never been found guilty of any sort of ethical violation whatsoever.

Now, however, with the institution of the new grievance procedures, his activities have become dangerous, for he is called by the Court of Appeals, "irritating"; they repeatedly, in the Opinion, dismiss his concerns as "frivolous" and "completely without

merit." After thirty years of honorable practice. He is beset with a thirty days trial in this case.

The practice of law will never be the same again if attorneys become vulnerable to a loose system of "attorney discipline." All will then have to toe the line, to march in lock-step. There is a serious conflict extant between the rights set up by this court for attorneys in the case of Spevack v. Klein, 87 S.Ct. 625, 385 U.S. 511, and the procedures in the present case. The procedures in question here are in direct conflict with Due Process decisions of this Court, and the Maryland court has created a miasmic horror in what is, in effect, a new, and constitutionally void type of procedure for trying attorneys. It amounts to a totally novel court of original jurisdiction restricted only to trying lawyers for misfeasance. It is devoid of the safeguards of fair trial generally recognized.

It is a dangerous departure --too far a departure, from the old peer-review system.

The Due Process questions were all raised and preserved below.

Should the procedures, and the conviction of this case not be reviewed, it is respectfully suggested that there will soon --very soon --come a time when the practice of law will have become restricted --to cowards, to reticent fellows, to those whose ways are conventional and whose thinking is not innovative.

The independence of the bar will be gone should these Maryland practices continue, and spread; and with independence, there also will go, the bar's consequent safety. --And its consequent freedom in protecting and forwarding and being concerned with, the interests of clients, of citizens.

The Court's power to disbar is not an arbitrary and despotic one to be exercised at the pleasure of the court or from passion, prejudice or personal hostility; but the court must exercise and regulate it by sound and just judicial discretion whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court as the rights and dignity of the court itself. C.A. Ill. (1950)

In re Fisher, 179 F.2d 361, certiorari denied Kerner v. v. Fisher, 71 S.Ct. 59, 340 U.S. 825, 95 L.Ed. 606.

Respectfully submitted,

Leonard J. Kerpelman
2403 W. Rogers Avenue
Baltimore, Maryland
21209
(301)727-8700

In Proper Person

80-854 No.

Supreme Court, U. S.
FILED
NOV 26 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

LEONARD J. KERPELMAN,

Petitioner,

vs.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND,

Respondent.

SUPPLEMENTAL APPENDIX

LEONARD J. KERPELMAN
2403 W. Rogers Avenue
Baltimore, Maryland 21209
(301) 727-8700

In Proper Person

4260

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850 | New York, N.Y. (212) 840-9494 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS
OF SUPPLEMENTAL APPENDIX

Page

Opinion of the Court 1

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND

v.

Leonard Jules KERPELMAN.

Misc. (Subtitle BV) No. 1.

Court of Appeals of Maryland.

Sept. 5, 1980.

Attorney Grievance Commission filed petition praying that disciplinary action be taken against respondent attorney. The Court of Appeals, Smith, J., held that advising client to take possession of child who had been placed in custody of client's former spouse by court order, attempting to charge client more than fee agreed upon and misrepresenting to client status of his case in order to justify improper fee warranted two-year suspension from practice of law for attorney whose prior professional record appeared to be unblemished.

Order accordingly.

1. Attorney and Client ⇐57

In attorney disciplinary action, trial judge's failure to find that attorney misrepresented fee to clients, or improperly prepared certain domestic relations cases for trial, was not clearly erroneous.

2. Jury ⇐19(18)

Right of trial by jury is not applicable to attorney disciplinary proceedings. Const. Declaration of Rights, Art. 5; U.S.C.A. Const. Amend. 5; Maryland Rules, Rule BV10 d.

3. Attorney and Client ⇐57

Attorney who was subject of disciplinary action followed an unacceptable method of procedure in simply asserting, with nothing more, that "Each and every Motion Raising Preliminary Objection made by [him] below should have been granted."

4. Attorney and Client ⇐57

Neither rulings on motions nor evidentiary rulings made in attorney disciplinary proceeding were erroneous; furthermore, respondent attorney should have specified which rulings he excepted to and the grounds of his exceptions.

5. Attorney and Client ⇐54

Judge presiding over attorney disciplinary proceeding sits as Court of Appeals' hearing examiner.

6. Attorney and Client ⇐54

Assuming propriety of a mistrial motion in attorney disciplinary proceeding, no error resulted from denial of attorney's motion.

7. Attorney and Client ⇐53(2)

Fact that only evidence presented against attorney in disciplinary proceeding was testimonial evidence given by complaining witnesses did not preclude finding that there was clear and convincing evidence of misconduct.

8. Attorney and Client ⇐56

Judge who presided over attorney disciplinary proceeding did not err in failing to discuss certain evidence in his opinion.

Opinion

9. Attorney and Client ⇐57

Even if it was error in attorney disciplinary proceeding to admit evidence of an episode which did not form basis of any charges, such error did not constitute basis for rejecting trial judge's findings.

10. Attorney and Client ⇐53(2)

Finding that complaining witness in attorney disciplinary proceeding, who admitted on the stand under oath that he lies when it is to his advantage, was a credible and truthful witness did not constitute error.

11. Attorney and Client ⇐54

Fact that inquiry panel made a formal finding that fees charged by respondent attorney with respect to matters which formed basis of charges in disciplinary proceeding were not excessive did not invalidate other findings relating to fees.

12. Attorney and Client ⇐57

Attorney, who introduced complaining witness' letter into evidence at his disciplinary hearing, could not complain on appeal of its admission.

13. Attorney and Client ⇐57

Trial judge did not improperly make changes in transcript of attorney disciplinary proceeding.

14. Attorney and Client ⇐32

Court of Appeals has power to promulgate rules regarding practice of law.

15. Attorney and Client ⇐53(2)

Findings made in disciplinary proceeding with regard to violation of disciplinary rules were not arbitrary and capricious or

against weight of the evidence. Code of Professional Responsibility, DR1-102(A)(1, 4-6), DR7-102(A)(7).

16. Attorney and Client ⇐38

Disciplinary Rules of Code of Professional Responsibility were applicable to charges of attorney misconduct arising from activities taking place subsequent to 1970.

17. Attorney and Client ⇐46

Even if attorney disciplinary proceeding was financed by an illegal tax on members of legal profession, such fact would not constitute defense to charges of attorney misconduct. Maryland Rules, Rule 1228.

18. Attorney and Client ⇐32

Lawyer may not advise his client to violate a law or court order except in instance of a test case where there is a good-faith belief that statute or order may be invalid. Code of Professional Responsibility, EC7-1 to EC7-3, EC7-5, EC7-22.

19. Attorney and Client ⇐58

Advising client to take possession of child who had been placed in custody of client's former spouse by court order, attempting to charge client more than fee agreed upon and misrepresenting to client status of his case in order to justify improper fee warranted two-year suspension from practice of law for attorney whose prior professional record appeared to be unblemished. Code of Professional Responsibility, DR1-102(A)(1, 4-6), DR7-102(A)(7), DR7-106(a).

Opinion

J. Martin McDonough, Jr., Sp. Asst. Bar Counsel, Baltimore, for Attorney Grievance Commission.

Leonard J. Kerpelman, Baltimore, pro se.

Argued before MURPHY, C. J., and SMITH, DIGGES, ELDRIDGE, COLE, DAVIDSON and RODOWSKY, JJ.

SMITH, Judge.

Pursuant to Maryland Rule BV9, the Attorney Grievance Commission acting through Bar Counsel filed a petition with us praying that disciplinary action be taken against Leonard Jules Kerpelman, a member of the Bar of this State. The complaint grew out of his representation of three individuals. Those relative to one individual ultimately were dropped. The disciplinary rules involved in the two remaining complaints were DR 1-102(A)(1), (4), (5), and (6); 2-106(A); 2-110(A)(2) and (B)(4); 6-101(A)(2) and (3); 7-102(A)(7); and 7-106(A). Pursuant to Rule BV9 b we designated the Honorable Marshall A. Levin, an associate judge of the Eighth Judicial Circuit of Maryland, to hear the charges. After extensive and protracted hearings, he submitted a comprehensive report to us in which he found clear and convincing evidence of violation of DR 1-102(A)(1), (4), (5), and (6); DR 7-102(A)(7); and DR 7-106(A).[1] We agree.

---

1. These latter disciplinary rules state in pertinent part:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(Cont'd

Opinion

We shall set forth the charges against Kerpelman together with the gist of the trial judge's findings on those charges. We shall then consider the exceptions of Bar Counsel and each of Kerpelman's forty-four exceptions. Then we shall discuss the applicable law and the appropriate sanction to be imposed. In an effort to provide a clear understanding of this matter, we set forth in an appendix that portion of the trial judge's opinion which concerns the facts adduced before him.

I The Malcomb matter

Bar Counsel alleged that in December 1975 John D. Malcomb sought the professional assistance of Kerpelman in regaining

---

(Cont'd)

(1) Violate a Disciplinary Rule.

* * * * * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

* * * * * *

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

DR 7-106 Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

the custody of one of Malcomb's two children (Malcomb's other child then being in his custody); that Malcomb was advised that it would cost him $1,000 plus court costs for Kerpelman to represent him; that on or about December 17, 1975 Malcomb paid Kerpelman $500; that a second $500 was paid before the scheduled hearing on June 8, 1976; that between December 1975 and June 1976 Malcomb advised Kerpelman by letter of the names of witnesses he believed could materially contribute to the case and should be interviewed; that during this period he notified Kerpelman of the facts of the case; that during this same period Kerpelman granted Malcomb only one forty to forty-five minute interview during which time Kerpelman "indicated a lack of familiarity with the facts and issues of the action"; that Kerpelman recommended to Malcomb the hiring of a private social worker to do an investigation of Malcomb for use at the custody hearing at a cost of $350, but, "at the time of trial, after her qualifications were presented to the Court, her report and its conclusions were ruled inadmissible by the Court"; that prior to the date of trial Kerpelman interviewed only one of the witnesses concerning whom Malcomb had previously advised him; that by his interrogation of witnesses at trial Kerpelman "indicated a lack of familiarity with the facts and issues of the action"; that at the conclusion of the custody hearing on June 8, 1976, the chancellor reserved his ruling; that on or about June 23, 1976, Kerpelman "sent a bill to Malcomb for a 'Further retainer' in the amount of $650";

that upon receipt of that bill Malcomb paid Kerpelman $50; that when subsequent to the hearing Malcomb was unsuccessful in making contact with Kerpelman he "contacted his former wife and her attorney, during the week of July 20, 1976, and learned that the Court had reached a decision based upon the hearing of June 8, 1976, which decision Malcomb found acceptable to him, in that one child was awarded to Malcomb, and the other to Malcomb's former wife, with the requirement that Malcomb pay $25 per week in support for the child awarded to his former wife"; that on or about July 27 Malcomb "encountered [Kerpelman] at a meeting of a group called Fathers United, at which time [Kerpelman] indicated to Malcomb that the Court had not yet reached a final determination on the custody issue, and that [Kerpelman] was still working on the matter on Malcomb's behalf"; that on or about July 28, 1976, Malcomb ascertained from the chancellor that he had in fact rendered a decision on the custody issue on July 20, 1976; that Malcomb telephoned Kerpelman on about July 28, 1976, to tell him of the information he had acquired from the trial judge at which time Kerpelman "again told Malcomb that the matter had not been settled;" that on or about July 29, 1976, "Malcomb notified [Kerpelman] by letter that he was terminating their relationship, after which [Kerpelman] continued to correspond with Malcomb, and with the Court on Malcomb's behalf"; that on or about August 26, 1976, Kerpelman "submitted another bill to Malcomb for an additional $1,250, re-

flecting an 'Additional final fee based on successful result,' resulting in a total additional claim of $1,850"; that on or about October 4, 1976, Kerpelman sued Malcomb claiming $1,850 "for services rendered by [Kerpelman]"; that on or about October 29, 1976, Kerpelman "submitted a third additional bill to Malcomb for an additional $1,000 for 'Re-analyzation of file, further additional fee based on time expended,' resulting in a total additional claim of $2,250"; that on or about February 11, 1977, Kerpelman amended his claim for damages in his suit against Malcomb "to $4,262, reflecting a total claim of $5,312, less the $1,050 previously paid by Malcomb"; and on or about March 21, 1977, Kerpelman "submitted a fourth additional bill for $4,262 as a 'Corrected bill based on final analysis done in January, 1977.'"

It was claimed, based on these allegations, that Kerpelman had violated DR 1-102(A)(1), (4), (5), and (6); DR 2-106(A); DR 2-110(A)(2) and (B)(4); and DR 6-101(A)(2) and (3).[2] The charges concerning

---

2. The disciplinary rules here involved which were not quoted in n. 1 state in pertinent part:

DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

DR 2-110 Withdrawal from Employment.

(A) In general.

* * * * * * *

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employ-

(Cont'd)

neglect and excessive fees ultimately were dropped.

At the conclusion of the hearings the trial judge framed the following as the issues to be determined by him:

1. Did Respondent violate any Disciplinary Rules by making an agreement with Malcomb that his representation of Malcomb would cost $1,000.00 and yet intended, at the time of the agreement, to charge an additional fee based on certain factors, including a successful result?

2. Did he further violate any Disciplinary Rule by allegedly misrepresenting to Malcomb that his case was not yet resolved in the judge's mind until the August 9, 1976 decree was signed and that he was working on the case, when in fact, the judge's ruling was on July 20, 1976

(Cont'd)

ment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

* * * * * *

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

* * * * * *

(4) He is discharged by his client.

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

* * * * * *

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

(and the only matter remaining was the drafting and approval of the Order) and respondent was not working on the case at all but rather trying to give the appearance of work in order to exact an improper fee from Malcomb.

3. Did Respondent violate any Disciplinary Rule by furthering a fraud on the court in not advising the court that the Malcomb decree was based on a fraudulent decree, i. e., a backdated separation agreement?

4. Did Respondent violate DR 1-102(A)(5) by his alleged conduct in paragraph 1, 2 and 3 above?

5. Did Respondent violate DR 1-102(A)(6) by maliciously escalating his fee to Malcomb and attempting to obtain improperly an improper fee from Malcomb in the absence of any fee agreement by Malcomb and in the absence of any basis therefor and by using the courts to obtain such improper fee?

6. Did Respondent violate said latter Disciplinary Rule by his alleged conduct in 2 above?

7. Did Respondent violate DR 2-110(A)(2) by improperly withholding Malcomb's papers and the decree after being discharged by Malcomb?

8. Did Respondent violate DR 6-101(A)(2) by lack of adequate preparation in that he conducted no discovery, interviewed no witnesses before trial, called witnesses who were of little or no probative value, failed to call witnesses who

were of probative value and generally displayed no knowledge of the facts surrounding the Malcomb case?

In his consideration of the matter the trial judge lumped together the issues concerning escalation of the fee. He found "by clear and convincing evidence that [Kerpelman] represented to Malcomb that his total fee for his representation in the custody case would be One Thousand Dollars ... and no more but that in violation of his agreement, he charged (or attempted to charge) Malcomb fees over the agreed upon amount; that [Kerpelman] made a wilful misrepresentation to Malcomb as to [Kerpelman's] fee; that [Kerpelman] maliciously and improperly escalated fee charges to Malcomb without any basis, without any agreement, without any warning; and without the escalated charges bearing any relationship to the amount of work done." On the basis of that finding he concluded that Kerpelman violated DR 1-102(A)(4) concerning engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; DR 1-102(A)(5) concerning engaging in conduct prejudicial to the administration of justice; DR 1-102(A)(6) concerning engaging in other conduct adversely reflecting on his fitness to practice law; and DR 1-102(A)(1) stating that a lawyer shall not violate a disciplinary rule.

On Issue 2 relative to misrepresentation as to whether or not a case had been "resolved in the judge's mind" the trial judge "conclude[d] by clear and convincing evidence that [Kerpelman] deliberately misrep-

resented to Malcomb that there remained work to be done on this . . . case and that . . . [Kerpelman] was actually engaged in performing such work, whereas, after July 20, 1976, there remained no work to be done and [Kerpelman], in fact, performed no work and that this misrepresentation was made to justify an improper fee." Upon this finding he concluded that there was a violation of DR 1–102(A)(4) and DR 1–102(A)(6).

The trial judge said he was "not convinced by clear and convincing evidence that [Kerpelman] furthered a fraud on the court" by "doing nothing to either advise Malcomb or the court of Malcomb's knowing acquiescence in [his former wife's] backdating of their separation agreement . . . ." He likewise found no clear and convincing evidence that Kerpelman violated DR 2–110(A)(2) relative to withdrawal from employment by withholding Malcomb's papers and the decree after being discharged by Malcomb and by continuing to deal with the chancellor after such discharge.

The trial judge likewise found no violation of DR 6–101(A)(2) on the issue of adequate preparation, stating, "What Bar Counsel perceives as inadequacy may well be trial tactics."

II The Draper matter

The petition for disciplinary action alleged that Marlene S. Draper was awarded a divorce a vinculo martrimonii from David W. Draper on or about January 7, 1975, in which she was awarded custody of their child; that in April 1976 Draper sought

Kerpelman's representation of him in an effort to have the decree modified by having custody awarded to him; that Kerpelman advised Draper "that the fee would be $960 plus court costs and that the fee should be paid prior to the date of any hearing on modification"; that Draper paid Kerpelman $500 on or about April 15, 1976; that on or about May 7, 1976, Kerpelman "submitted a bill to Draper in the amount of $10 for 'Filing fee for Petition for Modification of Decree as to Child Custody' "; that on or about May 14, 1976, Kerpelman filed a petition on behalf of Draper in the Circuit Court for Anne Arundel County for modification of the custody decree; that "[d]uring the period April, 1976, to August 21, 1976, [Kerpelman] advised and counseled Draper to take his child from Marlene S. Draper, then living in Syracuse, New York, and further planned with Draper the methods by which he was to obtain the child, notwithstanding the award of custody [in the divorce decree]"; that "[a]cting at the direction of [Kerpelman], on or about August 21, 1976, Draper entered the apartment in which Marlene S. Draper was then living, in Syracuse, New York, and '. . . Took the child *without the permission or consent of Marlene S. Draper* . . .,' returning with the child to Maryland"; that on or about September 7, 1976, Draper forwarded $460 to Kerpelman, being the remainder of the fee to which reference was previously made; that on or about September 30, 1976, the Circuit Court for Anne Arundel County ordered Draper to return the child to Marlene S. Draper "and to show

cause why he should not be found in contempt of that court for his actions [in retrieving the child]"; that on or about March 23, 1977, a hearing was held on Draper's petition for modification of the custody decree, which hearing resulted in an award of custody to Draper; that although Draper "on numerous occasions [requested] an interview in [Kerpelman's] office prior to the hearing of March 23, 1977, [Kerpelman] refused to meet with Draper"; that on or about March 24, 1977, Kerpelman "submitted a bill to Draper for an 'Additional final fee based on fully successful conclusion of case,' in the amount of $850, which amount Draper refused to pay"; that as a result of Draper's refusal to pay this sum of $850 "[Kerpelman] refused, upon Draper's request, to provide Draper with a copy of the Decree of Modification resulting from the hearing of March 23, 1977"; and that Kerpelman withdrew from representation of Draper on or about June 21, 1977, without providing Draper with a copy of the decree of modification. (Emphasis in original.)

Bar Counsel claimed that as a result of his actions Kerpelman had violated DR 1-102(A)(1), (4), (5), and (6); DR 2-106(A); DR 2-110(A)(2); DR 6-101(A)(2) and (3); DR 7-102(A)(7); and DR 7-106(A).[3] The charges relative to excessive fees and neglect ultimately were dropped.

---

3. The text of these disciplinary rules will be found in n. 1 and n. 2.

Opinion

At the conclusion of the hearings, the trial judge framed the following as the issues to be determined by him:

1. Did Respondent agree that his representation of Draper would cost "about $1,000.00" at a time when Respondent intended to charge more based on certain factors including a successful result?

2. Did Respondent violate any Disciplinary Rules by advising Draper to retrieve (meaning illegally child snatch) the child from Syracuse, New York in flat violation of an unmodified court decree awarding custody of the child to Draper's former wife (mother of the child)?

3. Did Respondent violate DR 1-102(A)(5) by his alleged conduct in 1 above?

4. Did Respondent violate said latter Disciplinary Rule by his alleged conduct in 2 above?

5. Did Respondent violate DR 1-102(A)(6) by his alleged conduct in 1 above?

6. Did Respondent violate said latter Disciplinary Rule by his alleged conduct in 2 above?

7. Did Respondent violate DR 2-110(A)(2) by allegedly refusing to deliver to Draper, the decree of modification (or copy) of March 23, 1977 (awarding custody to Draper–the result sought by Draper and objective in his hiring Respondent after the modification hearing and after Draper discharged Respondent? Did he

further violate said Disciplinary Rule by not avoiding foreseeable prejudice to Draper before he withdrew his representation of Draper and by doing nothing for Draper in the face of danger of additional litigation?

8. Did Respondent not violate DR 6–101(A)(2) by lack of adequate preparation, in that he never conducted discovery, never interviewed any witnesses nor had in person interviews with Draper?

9. Did Respondent not violate DR 7–102(A)(7) and 7–106(A) by his alleged conduct in 2 above?

The most serious charge against Kerpelman is that he advised a client to take steps to recover his child from the child's mother in New York State when, as Kerpelman knew, the mother had custody pursuant to a decree of one of the courts of this State. Here, as will fully appear by reference to the appendix to this opinion setting forth the findings verbatim, the trial judge found as a fact that Kerpelman "did suggest to his client, in flat violation of the Decree, that he (Draper) physically take the child from the Syracuse residence where she was living with her mother; that it was [Kerpelman's], and not Draper's suggestion; [and] that [Kerpelman] told Draper to not make it look like a breaking and entering but just to get the child . . . ." He found under this issue "by clear and convincing evidence that [Kerpelman's] conduct was in violation of Disciplinary Rules 1–102(A)(1), 1–102(A)(4), 1–102(A)(5) and 1–102(A)(6)"

relative to conduct involving dishonesty, etc., conduct prejudicial to the administration of justice, engaging in other conduct adversely reflecting on his fitness to practice law, and violation of disciplinary rules.

On the issues concerning misrepresentation as to fee, the trial judge said, "Despite all of the highly suspicious circumstances, I cannot find by *clear and convincing evidence* that [Kerpelman] intended to improperly charge a fee to Draper in violation of their fee 'agreement.'" (Emphasis his.) Likewise, on the issue relative to inadequate preparation the trial judge said he could not "find by *clear and convincing* evidence that [Kerpelman's] representation was *so* inadequate as to conclude that he violated DR 6–101(2) [DR 6–101(A)(2)]." (Emphasis his.) His concluding comment on this issue was, "In sum, while [Kerpelman's] representation was spotty and somewhat deficient, this court cannot find by *clear and convincing evidence* that [Kerpelman] handled the Draper case without preparation adequate in the circumstances." (Emphasis his.)

III Bar Counsel's exceptions

[1] Bar Counsel has excepted to the failure of the trial judge to find inadequate preparation in both the Draper and Malcomb matters and his failure to find that Kerpelman misrepresented the matter of his fee in the Draper matter. The trial judge saw and heard the witnesses. We did not. Our consideration of the exception for that reason must be similar to that where an action has been tried by the lower court

without a jury. In that circumstance Maryland Rule 886 provides that "the judgment of the lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses." In fact, in *Bar Ass'n v. Marshall*, 269 Md. 510, 516, 307 A.2d 677 (1973), Judge Digges observed for the Court that in a disciplinary case, referring to findings by a trial judge, "[T]he master's findings of fact from the evidence are prima facie correct and they will not be disturbed unless determined to be clearly erroneous." In *Moran v. Moran*, 219 Md. 399, 149 A.2d 399 (1959), we held that evidence should *not* have persuaded a trier of fact to a given conclusion warranting relief. Here we are requested to hold that evidence *should* have persuaded a trier of fact that certain violations existed. There is a substantial difference between the two propositions.

In *Racine v. Wheeler*, 245 Md. 139, 144, 225 A.2d 444 (1967), Judge McWilliams said for the Court, "Since the jury is free to believe only a portion of the evidence of each side the synthesis apparently accomplished by the jury is simply a manifestation of its obvious function." This comment continues to have viability. We have said this is no less true when a judge is the trier of fact. *Clemson v. Butler Aviation*, 266 Md. 666, 672, 296 A.2d 419 (1972), and *Davidson v. Katz*, 254 Md. 69, 80, 255 A.2d 49 (1969). The burden of proof was on Bar Counsel. On this record we cannot say that the trial judge was clearly in error when,

after considering all of the evidence, he was not convinced that Kerpelman misrepresented the fee to Draper or that Kerpelman failed to prepare properly the Draper and Malcomb cases for trial. As we observed in *Eidelman v. Walker & Dunlop*, 265 Md. 538, 545, 290 A.2d 780 (1972), and repeated in *Phelps v. Goldberg*, 270 Md. 694, 707, 313 A.2d 683 (1974), "For many years juries have been instructed at the request of defense counsel to the effect that if the evidence on a given proposition left their minds in a state of even balance or equipoise, then their verdict should be for the defendant because the plaintiff had not met his burden of proof.... A judge sitting as a trier of fact is not expected to go further in reaching a conclusion from the evidence before him than a jury." Certainly, where the burden is to produce clear and convincing evidence (a greater burden than in the ordinary civil case), the principle is no less applicable.

IV Kerpelman's exceptions

1–Right of trial by jury

[2] Kerpelman claims that "[h]e was denied the right to the interposition of a jury at any stage in the proceedings, either as trier of fact or as trier of fact and in law, and claims he is entitled to both." As with virtually all of his exceptions, he does not cite any cases or other authority in support of his claim nor does he specify from whence comes the right.

We assume that the right claimed to have been abridged is the one guaranteed by

Maryland Declaration of Rights Art. 5. This is reinforced by a purported election for jury trial filed in the trial court in which Kerpelman said, "That, said case being quasi–criminal in nature, the defendant further demands that all matters both of law and fact be submitted to the jury for its determination, as provided by the Constitution of the State of Maryland." In *Maryland St. Bar Ass'n v. Sugarman*, 273 Md. 306, 318, 329 A.2d 1 (1974), *cert. denied*, 420 U.S. 974, 95 S.Ct. 1397, 43 L.Ed.2d 654 (1975), we held that a disciplinary action against an attorney does not involve a criminal or quasi–criminal sanction within the purview of the Fifth Amendment to the Constitution of the United States.

Maryland Declaration of Rights Art. 5 states in pertinent part, "That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law ...." In *Knee v. City Pass. Ry. Co.*, 87 Md. 623, 624, 40 A. 890 (1898), Judge Pearce referred to this provision and said for the Court, "Language of similar import, is found in the Constitution of each of the United States, and the authorities are therefore naturally uniform to the effect, that it is the historical trial by jury, as it existed when the constitution of the state was first adopted, to which the inhabitants of each state are entitled ...." Maryland Rule BV10 d concerning hearing of disciplinary charges states, "The hearing of charges is governed by the same rules of law, evidence and procedure as are applicable to the trial of civil proceedings in equity." Civil pro-

ceedings in equity are not heard by juries nor were they at the time of the adoption of the Constitution of 1776. At one time we did have a statutory procedure in Maryland for sending issues from a court of equity to a court of law for determination by a jury. This no longer prevails. The Maryland authority, E. Miller, *Equity Procedure in Maryland* § 232 (1897), states, "An issue of fact to be tried by a jury is not a matter of right, at any stage of the proceedings, independently of statute ...." *Id.* 290–91. Thus, it follows that lawyer disciplinary proceedings are not required by the Constitution of Maryland to be heard by juries.

Even were there no provision in our rules to the effect that the proceedings should be conducted as in equity, disciplinary proceedings against attorneys, in the absence of a rule or statute providing to the contrary, are not encompassed within the constitutional guarantees of trial by a jury, be that guarantee state or federal. *Ex parte Wall*, 107 U.S. 265, 288–89, 27 L.Ed. 552, 2 S.Ct. 569 (1883); *Ex parte Burr*, 4 F.Cas. 791,796, 1 Wheeler, *Crim.Cas.* 503, 519–20, 2 Cranch C.C. 379, 390–91 (D.C. Cir. 1823) *aff'd* 22 U.S. (9 Wheat.) 529, 6 L.Ed. 152 (1824); *Ex parte Thompson*, 228 Ala. 113, 152 So. 229 (1933), and 7 Am.Jur.2d *Attorneys at Law* § 90 (1980). *Thompson* contains an excellent analysis of the matter and reviews decisions in numerous jurisdictions upon the subject. This contention is without merit.

2–Motions raising preliminary objection

[3] Kerpelman says, "Each and every Motion Raising Preliminary Objection made by [him] below should have been granted."

He adds no more. This is not an acceptable method of procedure. *See, e. g., Dean v. Redmiles*, 280 Md. 137, 169–70, 374 A.2d 329 (1977), and *State Roads Comm. v. Halle*, 228 Md. 24, 178 A.2d 319 (1962). In the latter case Judge Prescott said for the Court:

> Under its "Statement of Facts" in its brief, appellant alleges that, "both real estate witnesses [of the appellees] Jones and McCurdy, over objection, subtracted from their after value the sewer deficits computed by the witness Matz," without reference to the record extract wherein the witnesses testified as alleged, or the objections were made. Still under the same heading, it then alleges, "appellant moved that * * * that part of the real estate witnesses' testimony concerning sewer deficits be stricken, which motion was denied (E. 259–260)." The record sustains the fact that this motion was made and denied.
>
> But neither under this heading nor the heading of "Argument" in its brief does it present any argument in support of its contention on this point, nor do the appellees deal specifically with the question. Under these circumstances, we conclude the point has been waived. Maryland Rule 831 c 4; cf. *Fid. & Dep. Co. v. Mattingly Lumber Co.*, 176 Md. 217, 220, 4 A.2d 447; *Comptroller v. Aerial Products*, 210 Md. 627, 644, 124 A.2d 805. Surely it is not incumbent upon this Court, merely because a point is mentioned as being objectionable at some point in a party's brief, to scan the entire record and ascertain if there be any

ground, or grounds, to sustain the objectionable feature suggested. [*Id.* 31–32, 178 A.2d 323.]

We have examined the motions raising preliminary objection, however, and find no error in their denial.

3–Rulings on evidence

[4] Kerpelman, "excepts to the myriad rulings made by [Judge] Levin below on [Kerpelman's] objections to the introduction of evidence, and to each such ruling, and he makes each such ruling ground for exceptions to the acceptance of the findings which were made." That which we have just quoted from *Halle* is applicable here. Surely, it is not incumbent upon us to comb a transcript covering hearings approximately four weeks in length to find "the myriad rulings . . . on . . . objections to the introduction of evidence" when the experienced attorney involved does not see fit to specify to which rulings on the evidence he takes exception nor to state the basis of his objections. In our examination of the transcript, however, we have discovered no errors.

4–Rulings on motions

Kerpelman "excepts to the various rulings on motions which were made against him in the hearing below and he makes each such erroneous ruling the ground of an exception to the acceptance of the findings made." Again, he has failed to be more specific. We have found no errors in our examination of the record.

Opinion

5–Motions for mistrial

Numerous motions for mistrial were made during the course of the hearings. On this issue Kerpelman says he excepts "particularly [to] the failure to grant each and every specific motion or request for mistrial which was made below; he makes each of the said failures, which number approximately thirty or more the basis of an exception and says that each of the motions or requests for mistrial was well made or well taken and that for the failure to grant any, the findings made below should be dismissed."

[5, 6] It must be remembered that a trial judge in the position of Judge Levin in this case sits as our hearing examiner. *Attorney Griev. Comm. v. Bailey*, 285 Md. 631, 637, 403 A.2d 1261 (1979), and *Bar Ass'n v. Marshall, supra*, 269 Md. at 515–16, 307 A.2d 677. We note that Kerpelman has failed to be specific even as to the number of motions for mistrial he made. Assuming, arguendo, that such a motion is proper in this type of proceedings, from our examination of the record we find no error on the part of Judge Levin. Rather, we believe Judge Levin is entitled to commendation for his patient, courteous handling of a difficult proceeding.

6–9, inclusive–Further rulings on evidence

Kerpelman has excepted to the trial judge's "failure to permit testimony as to [Kerpelman's] ordinary practice as concerns fees," his "failure to permit witnesses called by [Kerpelman] to testify thereto referring

to [the practice concerning fees]," his "failure to permit other witnesses called by [Kerpelman] to testify," and "[t]he limitation on the number of character witnesses called by [Kerpelman]." Again, we find a lack of specificity. Although we permitted Kerpelman to file a revised brief subsequent to the argument is this matter, that rambling, forty-page document does not address this or many other points raised by the exceptions.

We have observed many times that the reception of evidence is to a large degree entrusted to the discretion of the trial court and its action will seldom constitute grounds for reversal. *See, generally, e. g., State v. Conn.*, 286 Md. 406, 425, 408 A.2d 700 (1979); *Impala Platinum v. Impala Sales*, 283 Md. 296, 332, 389 A.2d 887 (1978); *Radman v. Harold*, 279 Md. 167, 173, 367 A.2d 472 (1977); *Andrews v. Andrews*, 242 Md. 143, 152, 218 A.2d 194 (1966); *Smith v. State Roads Comm.*, 240 Md. 525, 214 A.2d 792 (1965); *Sanner v. Guard*, 236 Md. 271, 277, 203 A.2d 885 (1964); *Turner v. State Roads Comm.*, 213 Md. 428, 434, 132 A.2d 455 (1957); *Reid v. Humphreys*, 210 Md. 178, 185, 122 A.2d 756 (1956); *Barranco v. Kostens*, 189 Md. 94, 97, 54 A.2d 326 (1947); *Zeller v. Mayson*, 168 Md. 663, 667, 668, 669, 179 A. 179 (1935); *Ice Machinery Corp. v. Sachs*, 167 Md. 113, 126, 173 A. 240 (1934); and *Maryland Electric Ry. v. Beasley*, 117 Md. 270, 277, 83 A. 157 (1912). We find no error in this case.

10–16, inclusive–Alleged bias, prejudice, etc., of Judge Levin

These contentions are without merit.

17 and 18–Weight of the evidence

[7] In his seventeenth exception Kerpelman attacks the weight given to certain of the evidence, saying it "could not possibly have been 'clear and convincing' . . . ." We perceive no error.

In his eighteenth exception he suggests, "As a matter of law an attorney cannot be found to have erred by 'clear and convincing evidence' when the only evidence in the case is the testimonial evidence, as here, of the complaining witnesses in the two separate cases."

We recently had occasion in *Berkey v. Delia*, 287 Md. 302, 413 A.2d 170 (1980), to discuss clear and convincing evidence under the rule enunciated relative to libel and slander actions in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). We said:

> The fact that this is a "one on one" situation in no way precludes a determination by clear and convincing evidence as to which is speaking truthfully. That this is so is readily understood when we point out that in a criminal case an individual may be convicted upon the testimony of one witness who says that he saw the accused do the act constituting the crime notwithstanding the fact that the accused may say that he was not even present at the scene of the crime. Proof beyond a reasonable doubt, required in criminal cases, is a higher standard than proof by clear and convincing evidence required in a defamation case such as

this. [*Id.* at 330, 413 A.2d at 183.]

We point out that in *Caviness v. State*, 244 Md. 575, 224 A.2d 417 (1966), Judge Marbury said for the Court:

> We have held that the testimony of one eye witness, if believed, is sufficient to convict, *Turner v. State*, 242 Md. 408, 219 A.2d 39· *Hammond v. State*, 241 Md. 733, 217 A.2d 569; and *Wesbecker v. State*, 240 Md. 41, 212 A.2d 737. The trial court in a non-jury case is entitled to believe the identifying witness rather than alibi witnesses who place appellant elsewhere. *Campbell v. State*, 231 Md. 21, 188 A.2d 282; Rule 886 a. [*Id.* at 579, 224 A.2d at 419.]

This contention of Kerpelman is without merit.

19 and 20–Failure of the judge "to consider or discuss" certain evidence

[8] The opinion of the trial judge here covered eighty-five pages with more than eighteen additional pages of footnotes appended. The fact that certain evidence is not discussed in an opinion, even one as long as the one here before us, certainly does not indicate that there was a failure to consider any given evidence. It surely is not incumbent upon a judge in any case to discuss every piece of evidence presented. We perceived no error.

21–Admission of testimony of Mr. Brecka

[9] Kerpelman claims error in "[t]he admission of evidence of a collateral issue, that is the Brecka episode, and the admission of any of [Brecka's] testimony . . . ."

Kerpelman testified as part of his case;

A. When you have performed a child snatch, as any number of my clients on my advice have done, this also coming into play in showing that these statements are not, I believe, really inconsistent.

First of all, the use of the word "child snatch" was perhaps an unfortunate choice of words. I have for a long time regularly had occasion to advise fathers in the throes of a marital dispute, that in the absence of a court order, they can have an equal right to possession of the child and to obtain possession of the child. And this is a very vexed subject which is directly discussed in the meetings and legal clinics of Fathers United for Equal Rights.

And in the course of these many discussions at these legal clinics, the term "child snatch" has apparently come to be used to describe getting your child under circumstances which certainly can be valid circumstances. I *never* advised, never to the best of my recollection, advised a client to do that if there is a court order. [Emphasis added.]

This exception is based upon the fact that Bar Counsel later produced William Brecka as a witness. He testified relative to conversations with Kerpelman prior to the incident with which we are here involved:

A. The second conversation I had with him on the telephone when he asked—when he told me that I have to have a check for $950.00 or $850.00 and I have to

> be willing to do anything that was necessary to get custody of the children and I asked him what he meant by that and he kept avoiding the answer "well, just whatever is necessary," and he went on in that vein for a couple of more times and I decided well, I guess I am not going to get an answer here. It was at then the next time I met him was at a Father's United Meeting. After the meeting, outside the meeting room I got him alone at the top of the stairway and I said, "Now, what exactly do you mean by anything necessary to get the children" and he said, "Look," he said, "I will deny it if I am asked, but you have to get the children and keep the children and go as far away as possible and stay away as long as possible." That was the end of that conversation.

In his opinion, which we have reproduced in the appendix, Judge Levin dealt at some length with the admissibility of this testimony. He concluded by stating:

> The Brecka testimony was admitted solely for the purpose of credibility and has not been considered substantively. Finally, the evidence against Respondent is so overwhelming otherwise, that even if the Brecka testimony were inadmissible, it would make no difference at all.

We have heretofore pointed out the wide discretion with which a trial judge is vested in the matter of admission of evidence. Even if there were error here, which we certainly do not hold, the concluding statement by Judge Levin makes plain that such error would not be a basis for our rejecting his findings.

Opinion

22 and 28–Malcomb as a credible witness

[10] In his twenty–second exception Kerpelman took issue with "[Judge] Levin's 'finding' that Malcomb was both a 'credible' and 'truthful' witness, when Malcomb admitted on the stand under oath that he lies 'when it is to his advantage'."

In his twenty–eighth exception Kerpelman said:

> It is explicitly stated in the Record that Malcomb, by admission, "Lies when it is to his advantage"; the testimony of such a witness cannot, as a matter of law, amount to "clear and convincing evidence" in disciplinary charges against an attorney.

It was for Judge Levin to weigh all of the evidence. He saw and heard this witness. We have no reason to believe that he failed to weigh this statement of Malcomb in his determination of credibility. We perceive no error.

23 and 24–The Malcomb fee

Kerpelman states:

> 23. No charge was originally made as to any "excessive fee", but this sort of charge, apparently out of deference to More Important members of the bar than the Respondent was carefully avoided, but in fact, that is all that the charge concerning Malcomb amounts to by any clear and convincing evidence.
>
> 24. The Inquiry Panel made a formal finding that "no excessive fees were charged" and therefore each and every finding in any way related to fees should

be rejected, (a) as a general matter of Due Process, (b) as a general matter of evidence and weight of evidence, (c) as a matter which was not properly charged against the Respondent, (d) as a new charge which the Respondent was not informed of and would not have known of before the hearing.

[11] Throughout this proceeding Kerpelman has attempted unsuccessfully to portray himself as a victim of some sort of conspiracy on the part of "rich" lawyers in large firms.

As Judge Levin pointed out, on June 15, 1979, prior to the trial of this case on its merits, Bar Counsel withdrew the charges of violations of DR 2-106(A) (clearly excessive fee) in the relations of Kerpelman to Malcomb and Draper. We find this exception to be without merit.

25 and 26–Allegations that Judge Levin "consciously, maliciously, and deviously misled this Court" and "distort[ed] the Record"

These exceptions are so frivolous as to be unworthy of comment.

27, 29, and 30–Draper as under the influence of cocaine

Kerpelman says in these exceptions:

27. As to Draper, the Record contains a clear inference that he was under the influence of cocaine when he testified before Levin; as a matter of law an attorney cannot be found guilty for a disciplinary violation upon the testimony of one under the influence of cocaine.

29. The witness Draper testified in the case, and then after suspicions were aroused on the part of the Respondent, an Interrogatory was submitted to him asking whether he was on cocaine at the time he testified. Draper took the Fifth Amendment. Levin refused to strike the testimony. Levin accepted the word of Draper as to what had happened over the word of Kerpelman. This exception is that as a matter of law an attorney may not be found guilty under a "clear and convincing proof" test where the only evidence against the attorney is the uncorroborated testimony of a person who took the Fifth Amendment as to whether he was under the influence of cocaine when he testified.

30. The averments of exception 29 are hereby adopted by reference; Levin's refusal to strike Draper's testimony was severe and substantial error.

He fails to point out the portion of the record from which one might perceive this clear inference. As Bar Counsel puts it, Kerpelman "builds his case for the lack of competence of Draper upon his own suggestions and innuendoes, which are devoid of proof." We agree. Draper testified on June 18, 1979. If in fact Kerpelman at that time had information that Draper was under the influence of cocaine while testifying, that information should have been brought to the attention of the trial judge then. This allegation was presented to the trial judge at the last hearing in this matter in September 1979. Thus, it was clearly before the trial judge when he evaluated

the evidence adduced. He is not clearly in error in his evaluation.

31–Admission of evidence as to Kerpelman's "further[ing] fraud on the Court"

This exception in its entirety reads:

Levin erroneously admitted evidence concerning Respondent's "further(ing) fraud on the Court" (See page 67 of Levin's opinion) although the Respondent was not charged with this. This was the material relating to Malcomb having committed perjury in obtaining his original divorce by stating that the separation took place before the date when it actually did.

This was another side issue brought in by Levin, it obviously colored his decision although he did not make a finding of guilty on this matter, but the admission of this evidence must have been prejudicial. See *Bar Association v. Cockrell*, 270 Md. 686, 313 A.2d 816 (1974) holding that the charges must be "sufficiently clear and specific" so as to make the attorney aware of what he is compelled to answer for and defend against. At no time prior to the admission of this evidence by Levin had Kerpelman been charged with anything having to do with this backdating, which occurred long before Kerpelman was representing Malcomb. It was sprung on Kerpelman for the first time in the midst of the trial.

This is a false issue, to put it mildly. We have already quoted from Judge Levin's opinion (without specifying, however, that

he said it on page 67) to the effect that on the issue of backdating of the separation agreement he was "not convinced by clear and convincing evidence that [Kerpelman] furthered a fraud on the court." He also said in that opinion:

> Respondent tried to exploit the fact that Malcomb accommodated [his former wife] when she "backdated" their separation agreement one month. This was mendacious conduct on Malcomb's part and Respondent excoriated Malcomb. However, by the same token, Respondent too knew that the March 29, 1974 agreement was based upon a fraudulent date and he too did the same thing as Malcomb–he kept quiet. His testimony concerning this inaction is evasive and unconvincing. Apart from this, I find Malcomb's testimony truthful and credible.

Kerpelman began his cross–examination of Malcomb on June 19. When court reconvened on June 21 other witnesses were put on the stand as an accommodation to various persons. Then Malcomb resumed the stand for further cross–examination. The first question propounded by Mr. Kerpelman to Malcomb was whether he had "ever lied to get a desired result in an important matter." After a response that he was unaware of having done so, Kerpelman showed him a letter from Malcomb to Kerpelman dated May 5, 1976. Then the record reflects:

> MR. KERPELMAN: Now, if Your Honor please, I feel that, perhaps, it is incumbent on me to suggest to the wit-

> ness that he has a right, I believe, not to answer under the Fifth Amendment to the United States Constitution. Shall I advise him on that?

A lengthy discussion then ensued. Ultimately a copy of the letter in question was made and delivered, with her husband's consent, to Mrs. Malcomb in order that she might consult an attorney on his behalf. When court resumed that afternoon it was brought out that after consultation with his attorney Malcomb had no objection to testifying. The letter in question was shown to Malcomb. After Malcomb's identification, it was admitted into evidence upon Kerpelman's motion as "Respondent's Exhibit No. 5." The first paragraph of the letter states:

> At the time my former wife and I signed our separation agreement, she requested that I agree that the separation actually had taken place the previous February rather than in March. She seemed very anxious that I do this, so I agreed. This obtained the divorce one month sooner than would otherwise have been possible.

[12] Having himself introduced the letter into evidence, Kerpelman cannot now be heard to complain relative to its admission. Moreover, as Kerpelman concedes, the trial judge did not find clear and convincing evidence to indicate that Kerpelman had furthered a fraud on the court.

32–Judge Levin's alleged "clear and absolute error of law" relative to Kerpelman's fee dispute with Malcomb

In this exception Kerpelman states:

32. Levin committed a clear and absolute error of law in coming to his conclusion that Malcomb had been overcharged. At page 63 of Levin's opinion he referred to the Respondent's continuing to contend, to argue, in Malcomb's behalf, upon the question of whether Malcomb should pay support when one child was awarded to him and one child was awarded to the mother. Levin states the question was *not* still open. [(Emphasis in original.)]

At page 64 of his opinion Levin, with emphasis, states:

> "Despite Merle's (the mother's) earning *capacity* (she was *not* then employed) and marriage, it was decidedly unrealistic to expect any court to not require a father (earning near $22,000 per year–as per Malcomb's Answer 3 to Merle's Interrogatory–as prepared by Respondent) to pay something for the support of his child."

This is a complete and total misstatement of the law as it existed at the time in question, which was 1976. At that time the law was enunciated in the case of *Hare v. Hare*, a *per curiam* decision filed February 22, 1974, No. 443, September Term, 1973. This is an unreported decision and it is not referred to here as a citation. Rather, it is referred to to show what the Court of Special Appeals itself has said the law was at that time, and because reference to it was part of the trial testimony. The *unrefuted*, uncontradicted, evidence in the case before Le-

vin *was* that this was the law at that time. The Respondent specifically so testified. But no, Levin takes matters into his own hands and states the law *another* way, and erroneously. At page 7 of the *Hare* opinion it is stated:

> "The amount of support each will be required to provide is to be determined by an evaluation of each party's relative financial status, work history and *earning capacity*." (Emph. supp.)

Thus Levin's finding was clearly erroneous as a matter of law.

A copy of *Hare v. Hare* is attached hereto.

The *Hare v. Hare* test of *earning capacity* was not changed until *Rand v. Rand*, [280 Md. 508,] 374 A.2d 900 [(1977)], wherein, in 1979 [sic], the court seems to have changed the test to something else. But the rule set forth in *Hare* is the rule as it existed at the time in question.

Kerpelman testified in the case below that this was the law and there was no contradiction. Nor can any citation be produced against this proposition. Kerpelman testified that he had this above quoted passage memorized and it was the test in all of his cases at that time.

It is also pointed out that the testimony was that the mother was married to a spouse who was earning around $30,000 per year, and therefore had negligible or no overheard expenses of her own, so that whatever money or earning capacity she had, was entirely available for the support of the child in question. [Emphasis in original.]

Opinion

What Judge Levin said on page 63 of his opinion was:

> It is undisputed that Respondent never discussed any of his escalating bills with Malcomb beginning with the Six Hundred Fifty Dollar ($650.00) bill. He simply sent them to Malcomb. As to Respondent's August 26, 1976 bill of One Thousand Two Hundred Fifty Dollars ... ("Additional final fee based on successful result,") if the July 20, 1976 conference (at 2:00 P.M. with Judge MacDaniel left matters so up in the air as Respondent contended ("subject to all sorts of wavering winds of change ... open at that time, was the question of whether Malcomb should pay support, it was still open to contest"), why would Respondent charge Malcomb an additional fee for "successful result?" According to Respondent, he felt that the July 20, 1976 decision reached by Judge MacDaniel (requiring Malcomb to pay Twenty-five Dollars ... per week as support for Heather) was "unreasonable and unfair" and felt it would be "preferable to have a formal hearing." Obviously, in Respondent's mind, this could not be called a "successful result" under such unfair circumstances even if Malcomb did retain Kirsten (whom he had before Respondent came to represent him).

The quotation by Judge Levin on page 63 concerning "subject to all sorts of wavering winds of change," etc., was from Kerpelman's response to Bar Counsel's demand for admission of relevant facts. The demand was that Kerpelman admit that "in [a] tele-

phone call [previously referred to in the demands he] advised John D. Malcomb that the 'custody matter,' referring to the decision in the case of *Malcomb v. Malcomb*, Equity No. 78654, was not yet settled." Kerpelman denied the statement, saying he "ha[d] no recollection as to this but by virtue of the fact situation, [it was] quite unlikely that this would have been stated," adding that "the question [was] designed as a conscious trap for the tryer [sic] of fact in this case." He then went on to claim "that custody matters and in fact all equity matters are in fact still open until decree is signed." He then made the other statements quoted by Judge Levin.

We agree with Judge Levin that under the law as it has existed and continues to exist it is unrealistic to expect a court not to require a father earning $22,000 per year to pay *something* for the support of his child.

Kerpelman is in error when he suggests that the trial judge came to a "conclusion that Malcomb had been overcharged." He reached no such conclusion. He determined, as we have earlier indicated, that Kerpelman represented to Malcomb that his total fee for representation would be $1,000.00 and no more, but that in violation of this agreement Kerpelman charged or attempted to charge Malcomb fees over and above the agreed upon amount, that Kerpelman made a wilful misrepresentation to Malcomb as to the fee, and that Kerpelman maliciously and improperly escalated the fee charges to Malcomb without any basis,

without any agreement, without any warning and without the escalated charges bearing any relationship to the amount of work done.

33–Changes in transcript

[13] In this exception Kerpelman states:

> 33. Levin has freely, and over objection of the Respondent, made numerous changes in the transcript. These objections appear in the file in the form of letters [sic] from the Respondent. Levin was not authorized by law, and it is unlawful for him to make such changes. He was requested by the Respondent to, at best, make changes by striking through but leaving, the old material so that it could still be seen as part of the record. This too, he refused to do.

Again, Kerpelman neither gives the specifics of his allegations nor cites authority for his position.

The trial judge patiently went over the transcripts. He wrote to the court reporters involved indicating that he wished to bring to their "attention certain errors [he] perceive[d]." He said these corrections were "very minor but [he] fe[lt] that the official transcript should reflect accurately what was actually said." In each instance he said:

> If you do not tell me you disagree with the within by January 9, 1980 (either in writing or verbally), then I will assume that as far as you are concerned, I may correct the official transcripts according-

ly. I am sending a copy of this letter to Bar Counsel and Respondent and if they do not object (in writing) on or before January 16, 1980, then I shall actually correct the official transcripts accordingly. If either does so object, in writing before January 16, 1980, I shall set in this matter for hearing promptly.

One stenographer stood by his record as to one entry. As to another where the trial judge thought the word "other" should be "none" the stenographer believed it should be "more." Neither Bar Counsel nor Kerpelman filed objections within the time specified.

There are two letters in the file from Kerpelman *after* the deadline set in Judge Levin's letters. One such letter, which hardly can be called an objection, is dated February 1, 1980. It states:

Citizen Marshall A. Levin
Criminal Courts Building
Courthouse
Baltimore, Maryland 21202

RE: Attorney Grievance Commission v. Kerpelman Misc. Docket (Subtitle BV) No. 1, Sept. Term 1979

Citizen Levin:

I have your various letters concerning "errata" in the transcript.

I am reminded of the sage who said: "Thou seest the mote in the eye of thy brother but seest not the beam in thy own eye."

Why don't you disqualify yourself in this matter as your oath of office requires you to do.

Opinion

/s/ Kerpelman
Kerpelman

K/bg

cc: J. Martin McDonough, Attorney

The other letter is dated January 29. It "demand[s]" that no changes be made. It "also demand[s]" that if there are changes that the transcript be made to show "*what the reading was before [the judge] changed it and what the reading was after [he] changed it.*" (Emphasis Kerpelman's.) The record makes abundantly plain the bases for change.

The following are a few examples selected at random from the various changes proposed by Judge Levin:

DATE	PAGE	LINE	AS IN TRANSCRIPT	SHOULD BE
5/22/79	42	19	Mosher	Moser
5/22/79	271	13	Slicker	Slicher
6/19/79	88	24	to	too
6/19/79	147	4	aggitated	agitated
7/16/79	80	12	or	are
9/7/79	6	7	epitaphs	epithets
9/10/79	108	8	affect	effect
9/10/79	108	10	insistance	insistence

This contention is without merit.

34–"[A]buse of, and a denial of Due Process"

In this exception Kerpelman contends:

34. It is an abuse of, and a denial of Due Process to have the fact inquiry made by reference, in effect, to a master, and the question of disposition performed by this court; it is only in the course of a full-fledged fact finding inquiry that the true context, coloration, background, and proper inferences relating to disposition

can be acquired; the procedure being used here is therefore invalid.

This is yet another of his contentions for which Kerpelman cites no authority.

For generations in proper circumstances, courts, state and federal, including the Supreme Court of the United States, have made use of masters who have heard the evidence after which the ultimate disposition has been made by the court. This contention is without merit.

35–Denial of due process by the extent of the proceedings

In this exception Kerpelman contends:

35. The proceedings were so protracted, expanded, and enlarged, particularly by bringing in collateral and other inadmissable [sic] issues, that the court is now presented with a transcript which it is believed is so long that members of this Court will not read it and the case will be decided not only on the evidence presented, but on the so–called findings of Levin; and these are distortions; and the Respondent is denied thereby Due Process of law.

As these exceptions illustrate, if these proceedings have been unduly "protracted, expanded, and enlarged," to a large degree this is the work of Mr. Kerpelman. Although he has raised myriad issues in his exceptions, many of which are frivolous, to put it mildly, he has made no reference to one very important issue which we shall discuss later in this opinion.

The contention is without merit.

36–This Court's rule making power

[14] In this exception Kerpelman states:

> 36. This Court's rule making power in this area was a wrongful usurpation of legislative power, and was unlawful; or it was an unlawful delegation by the legislature to this court; in either case it is a denial of Due Process as well as an unlawful exercise of power to determine who shall practice law. Note that the legislature has designated the oath of office for attorneys and it is for the legislature alone to set standards. This court, in addition, bears its own bias and prejudices as to how law should be practiced and has induced these biases and prejudices into, and read them into the proceedings herein, which it has no lawful right to do, and the proceedings are invalid.

Again, no authority is cited for the contention. The superintending power of courts over their bars is deeply ingrained in the system of law which we inherited from our forebears at the time of the American Revolution. It has continued to this day. The contention is without merit.

37–40, inclusive–Findings were arbitrary and capricious, against the evidence, against the weight of the evidence, and not based on clear and convincing evidence

[15] We hold to the contrary. We find clear and convincing evidence to support the conclusion of Judge Levin that Kerpelman escalated his fee in the Malcomb matter, that Kerpelman misrepresented to Malcomb that there remained work to be done

on Malcomb's case, and that Kerpelman suggested to his client that in violation of a decree of the Circuit Court for Anne Arundel County (of which Kerpelman had knowledge) that the client physically remove his child from the custodian under the decree, the child's mother. Accordingly, we find clear and convincing evidence of violation of DR 1-102(A)(1) (relative to violating a disciplinary rule), DR 1-102(A)(4) (relative to engaging in conduct involving dishonesty, etc.), DR 1-102(A)(5) (relative to engaging in conduct prejudicial to the administration of justice) and DR 1-102(A)(6) (relative to other conduct adversely reflecting upon an individual's fitness to practice law).

We shall leave to our discussion under Part V of this opinion the question of whether Kerpelman's conduct in the matter of the child amounted to a violation of DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), DR 1-102(A)(5) (engaging in conduct that is prejudicial to the administration of justice), DR 1-102(A)(6) (engaging in any other conduct that adversely reflects on his fitness to practice law); DR 7-102(A)(7) (to the effect that a lawyer shall not counsel conduct the lawyer knows to be illegal) and DR 7-106(A) (concerning advising a client to disregard a ruling of a tribunal made in the course of a proceeding).

41-Charges added after trial began

In this contention Kerpelman says:

41. Charges were added and adduced over and against the Respondent after the trial was begun contrary to the re-

quirements of *Bar Association v. Cockrell*, 270 Md. 686, 313 A.2d 816 (1974).

As our previous discussion of the allegations against Kerpelman and the findings by the trial judge will reflect, Judge Levin's finding of clear and convincing evidence of violations of the disciplinary rules applied to no charge added after the petition for disciplinary action was initially filed in this Court. Hence, this is yet another frivolous contention.

42–Kerpelman's memorandum

This exception is based upon what Kerpelman calls "[Judge] Levin's failure to regard [sic] Respondent's Memorandum filed below." He does not elucidate. Thus we do not know to what memorandum he refers. He filed a number of memoranda. We can only say that from a detailed, careful examination of the record and transcript we find that Judge Levin gave commendably patient, careful, courteous and detailed consideration to each and every contention advanced by Kerpelman, no matter how frivolous the contention might have been or how irritating or discourteous Kerpelman's manner in advancing his contention might have been.

43–Ex post facto

[16] In this exception Kerpelman says:

> 43. The present proceedings are being carried on under what amounts to an *ex post facto* law; the Respondent should have been proceeded against under the old Canons of Professional Ethics.

Yet again, the basis of the contention and the authority therefor is not specified.

Opinion

Rule BV1 j defines "misconduct" as "an act or omission by an attorney, individually or in concert with any other person or persons which violates the Disciplinary Rules of the Code of Professional Responsibility as adopted by Rule 1230 . . . ." That Code, appearing as Appendix F of the Maryland Rules, was adopted October 13, 1970. There have been but two amendments since then, one on December 9, 1976, effective January 1, 1977, as result of the Report and Recommendations of the Special Commission to Study Prepaid Legal Service Plans in Maryland, and another on March 8, 1978, effective May 1, 1978, pertaining to lawyer advertising. Those amendments are not involved in this case. The instances in question here all took place subsequent to 1970. Accordingly, this contention likewise is without merit.

44–Tax

In this exception Kerpelman states:

> 44. The present proceedings were brought and supported under a provision of the Rules of this court laying a tax on members of the legal profession as a requirement of practicing law; only the Legislature can lay or levy a tax; the proceedings therefore are invalid.

[17] He obviously is referring to the fact that Rule BV2 creating the Attorney Grievance Commission provides for the establishment of the Disciplinary Fund. Members of the Maryland Bar are required to contribute annually to it "as a condition precedent to the practice of law" at the same time they pay the sums required un-

der Rule 1228 establishing the Clients' Security Trust Fund. The operations of the Attorney Grievance Commission and the office of Bar Counsel are financed from this fund.

In re Member of Bar, 257 A.2d 382 (Del. 1969), *appeal dismissed sub nom. In re Reed*, 396 U.S. 274, 90 S.Ct. 562, 24 L.Ed.2d 464 (1970), concerned a similar attack upon Delaware's clients' security trust fund. In rejecting such a contention Chief Justice Wolcott said for the Supreme Court of Delaware, "The short answer to this contention is that the payment required is an assessment and not a tax". *Id.* at 385. This may or may not be correct, but even if Kerpelman's point were well taken, it would not be an excuse for unethical conduct on the part of a member of the bar of this Court, nor would it be a defense to charges relative to such conduct.

V Legal effect of counseling violation of a court decree

It will be recalled that DR 7-102(A)(7) states that in his representation of a client a lawyer shall not counsel or assist his client in conduct which the lawyer knows to be illegal. This is the principal disciplinary rule which Kerpelman was found by the trial judge to have violated when he gave advice relative to the child. Canon 7, to which this disciplinary rule is applicable, states that a lawyer should represent a client zealously within the bounds of the law.

Kerpelman at oral argument before us opened with a reference to the oath of an

attorney when admitted to practice in this Court, focusing on that portion of Code (1957) Art. 10, § 10 in which an attorney says:

> I do solemnly swear (or affirm) that . . . I will bear true allegiance to the United States, and that I will support, protect and defend the Constitution, laws and government thereof as the supreme law of the land; any law or ordinance of this or any State to the contrary notwithstanding.

He then said:

> An attorney is to make a judgment as to what rules, ordinances and statutes are unconstitutional and by his Maryland oath of office set forth by the Maryland Legislature, he is to place his opinion of the Constitution above the rules of this Court or an ordinance or statute.

He argued that pursuant to his oath it would be permissible for an attorney to advise a client to violate a court order he deemed constitutionally invalid.

[18] The conventional wisdom of the courts and the legal profession has been that a lawyer may not advise his client to violate a law or court order, except in the instance of a test case where there is a good faith belief that the statute or order may be invalid. *See, e. g.*, EC 7–1; EC 7–2; EC 7–3; EC 7–5; EC 7–22; former Canon 16; former Canon 32; A.B.A. Project On Standards for Criminal Justice, Standards Relating to the Defense Function § 3.7 (approved draft 1971); Cowen, *The Lawyer's Role in Civil Disobedience*, 47 N.C.L.Rev. 587, 592–

93 (1969); H. Drinker, *Legal Ethics*, 150, 152 (1953); *Maness v. Meyers*, 419 U.S. 449, 458–60, 468, 95 S.Ct. 584, 590–92, 596, 42 L.Ed.2d 574 (1975); *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 197 (9th Cir. 1979); *In re Grand Jury Proceeding*, 601 F.2d 162, 169 (5th Cir. 1979); *United States v. Dickinson*, 465 F.2d 496, 512 (5th Cir. 1972); *Odell v. Bausch & Lomb Optical Co.*, 91 F.2d 359 (7th Cir. 1937); *Snyder v. State Bar*, 18 Cal.3d 286, 133 Cal.Rptr. 864, 555 P.2d 1104 (1976); *In re Mekler*, 406 A.2d 20 (Del. 1979); *Committee on Professional Ethics, Etc. v. Crary*, 245 N.W.2d 298, 307 (Iowa 1976); *In re Marietta*, 223 Kan. 11, 569 P.2d 921 (1977); *In re Daly*, 291 Minn. 488, 489, 495, 189 N.W.2d 176 (1971); *In Matter of Johnson*, 597 P.2d 740 (Mont.1979); *In re Cooley*, 95 N.J.Eq. 485, 490, 125 A. 486 (1924), *aff'd* 103 N.J.Eq. 377, 143 A. 916 (1928); *In re Hittson*, 20 N.M. 319, 325, 326, 150 P. 733 (1915); *Territory v. Clancy*, 7 N.M. 580, 37 P. 1108 (1894); *In re Apfel*, 202 App.Div. 76, 195 N.Y.S. 325, 328 (1922); *In re Clostermann*, 276 Or. 261, 263, 554 P.2d 467 (1976); and *Ex parte Miller*, 37 Or. 304, 60 P. 999 (1900).

[19] In this instance Kerpelman has not articulated an argument that the decree was constitutionally infirm. In fact, there is not the slightest suggestion of any infirmity in the Draper custody decree. This was no test case nor did the custody order compel the surrender of any constitutional right.

As to Kerpelman's argument that he did not commit the act alleged, we point out that Judge Levin said:

Opinion

I find as a fact that in August, 1976, Respondent did suggest to his client, in flat violation of the Decree, that he (Draper) physically take the child from the Syracuse residence where she was living with her mother; that it was Respondent's and not Draper's suggestion that Respondent told Draper to not make it look like a breaking and entering but just to get the child; that if it was successful, "we" might get a faster response from the court and it would show good concern on Draper's part; and that Respondent told Draper not to say anything to anybody about it. I find further that the idea of taking [Marlene's estranged husband] and the two men was Draper's, not Respondent's (but that Draper's idea emanated directly from Respondent's suggestion that Draper not break in. Thus Draper took Marlene's estranged husband to trick her into opening the door).

* * * * * *

Respondent is obliged to admit that he advised any number of his clients to perform child snatches, yet he tried to expiate his admission by saying he only meant legal child snatches. By legal, he says he means taking your child *before* there is a court order. He acknowledges, however, he made an "unfortunate choice of words" and he further acknowledges that he is "not saying that it (child snatch) cannot cover an illegal one." His explanation is fanciful and absurd. He is hoist by his own petard.

> It is interesting to note that when Draper testified at the March 23, 1977 hearing as to why he snatched the child, he testified that *he went on Respondent's advice*. Thus Draper's exact same version was given before Judge Beardmore [in the child custody hearing in the Circuit Court for Anne Arundel County] *at a time when there was no complaint by him against Respondent*, the same version was given before the Inquiry Panel; and the same version was given in instant case. Draper's testimony is entirely consistent and credible as opposed to the testimony of Respondent—testimony which is riddled with self–contradiction, inconsistency and illogic. [(Emphasis in original.)]

We have already held that there was clear and convincing evidence to support these findings.

The courts were open for a petition for a change of custody, as Kerpelman well knew, having prepared such a petition. If people are permitted to pick and choose which orders of court they proposed to obey, our legal system will soon disintegrate and our government of laws will be replaced by anarchy.

We conclude, therefore, that Kerpelman's conduct in the matter of the child amounted to a violation of DR 1–102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), DR 1–102(A)(5) (a lawyer shall not engage in conduct that is prejudicial to the

administration of justice), DR 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law), DR 7-102(A)(7) (a lawyer shall not counsel conduct which he knows to be illegal) and DR 7-106(A) (a lawyer shall not advise a client to disregard a ruling of a tribunal made in the course of a proceeding), as well as DR 1-102(A)(1) (a lawyer shall not violate a disciplinary rule).

VI Sanctions

There have been no disciplinary actions against Kerpelman in this Court in which he has been adjudged in violation of any of the Disciplinary Rules. Bar Counsel has not advised us of any disciplinary actions in trial courts prior to our assuming jurisdiction of such matters in which Kerpelman was found to have violated the Disciplinary Rules nor has he advised us of any reprimands. Thus, his prior professional record appears to be unblemished. Many times in recent years this Court has quoted from *Ex parte Brounsall*, 2 Cowp. 829 (1778), what has come to be known as "The Lord Mansfield Rule." It is to the effect that in disciplinary proceedings the inquiry is to whether after the conduct of such individual it is proper that he should continue to be a member of a profession which should stand free from all suspicion, such proceedings not being by way of punishment, but the court in such cases exercises its discretion whether a person whom they have formerly admitted to practice is a proper person to be continued on the roll or not. By the same token, a suspension is for the

protection of the public, not by way of punishment of the individual lawyer. It protects the public because it demonstrates to members of the legal profession the type of conduct which a court will not tolerate.

We have before us three separate violations of the Disciplinary Rule: the matter of the Malcomb fee, the matter of the statement to Malcomb that his custody matter had not been concluded when in fact it had been, and the matter of the advice relative to retrieval of Draper's child in disregard of a court order.

Kerpelman's conduct in the matter of his fee and his misrepresentation to his client of the then posture of the proceedings pending in the Circuit Court for Baltimore County represents a type of conduct against which the public is entitled to protection, conduct which brings the legal profession into disrepute. It reflects adversely upon the courts since lawyers are officers of the courts. We have here a finding by the trier of fact that Kerpelman made a wilful misrepresentation to Malcomb as to his fee and that he maliciously and improperly escalated his fee charges to Malcomb without any basis, without any agreement, without any warning, and without the escalated charges bearing any relationship to the amount of work done. We likewise have a conclusion that Kerpelman deliberately misrepresented to Malcomb that there remained work to be done on the case and that Kerpelman was actually engaged in performing such work when no work remained to be done, a misrepresentation made to justify an improper fee.

Although one may infer from the proceedings here that the Draper matter is not the first and only instance in which Kerpelman had advised self-help on the part of his clients in disregard of a court order, such other instances may not be used in determining the sanction, he not having been charged with them. *Bar Ass'n v. Cockrell*, 270 Md. 686, 313 A.2d 816 (1974). If Kerpelman were charged with multiple violations of court orders in child custody or other matters under circumstances similar to the case at bar and such charges were proved, we would disbar him forthwith without hesitation. Such contumacious conduct on the part of an officer of the court sworn to uphold the law cannot be tolerated.

We conclude that the proper sanction to be imposed here, taking into account all of Kerpelman's misconduct, is a suspension of two years. Therefore, Leonard Jules Kerpelman shall stand suspended from the practice of law in this State for the period of two years accounting from thirty days from the date of this opinion. He shall stand suspended beyond that date unless and until all costs incurred in connection with this proceeding are paid in full.

IT IS SO ORDERED; RESPONDENT SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT, INCLUDING THE COSTS OF ALL TRANSCRIPTS, PURSUANT TO MARYLAND RULE BV15 c FOR WHICH SUM JUDGMENT IS ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION

No. 80-854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEONARD J. KERPELMAN,

Petitioner,

v.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND,

Respondent.

APPENDIX TO BRIEF FOR RESPONDENT

HENRY J. MYERBERG,
Acting Bar Counsel
District Court Building
Taylor Avenue and Rowe Boulevard
Annapolis, Maryland 21401
Telephone: (301) 269-2791

M. PETER MOSER
ALAN I. BARON
1300 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Baltimore, Maryland 21201
Telephone: (301) 547-0500

January 26, 1981

TABLE OF CONTENTS

	PAGE
Appendix to the Court of Appeals Opinion in the case of Attorney Grievance Commission v. Leonard J. Kerpelman. ___ Md. ___, 240 A.2d 940 (1980)	2
Trial Court's Statement of Procedure, Findings of Fact and Conclusions of Law	25
Maryland Constitution, Article 4, Section 18	129
Maryland Laws 1977, Chapter 305	130
Maryland Rules of Procedure, Chapter 1100, Subtitle BV — Discipline and Inactive Status of Attorneys	132
Maryland Rules of Procedure, Rule 1230	160
Petitioner's Exemptions in Court of Appeals Nos. 8 through 16	161

No. 80-854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEONARD J. KERPELMAN,

Petitioner,

v.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND,

Respondent.

APPENDIX TO BRIEF FOR RESPONDENT

APPENDIX *

In his report to us Judge Levin set forth in detail his findings of fact and conclusions of law. He provided a citation to appropriate portions of the transcript for each and every factual statement made. We reproduce a portion of that report as an appendix to this opinion. Although we in our opinion have referred to the Malcomb matter first and the Draper matter second because that is the order in which they appeared in the original complaint, we here set these matters forth in the order in which they appeared in Judge Levin's opinion. We have eliminated his citations to the transcript. With minor stylistic editing where the matter of money is mentioned, Judge Levin's opinion states in pertinent part relative to the charges before him (all emphasis being his):

THE DRAPER CASE

Issue One—Did Respondent agree that his representation of Draper would cost "about $1,000.00" at a time when Respondent intended to charge more based on certain factors including a successful result?

Findings of Fact

Draper, age twenty-six at instant hearing, was married to Marlene Boetker (Marlene) on July 29, 1970. One child, Jennifer Britton Draper (child) was born of this marriage on March 19, 1972. On October 15, 1974, Marlene sued Draper for an absolute divorce on the ground of mutual separation and sought custody of the child. Draper admitted all of her allegations by his answer .... On January 7, 1975, Marlene and Draper were divorced absolutely, Marlene was granted custody of the child, Draper was awarded "reasonable rights of visitation" and ordered to pay $25.00 per week child support (Decree).

Draper felt later that the child was living in an "unfit environment" and wanted to "change custody." When he met Respon-

---

* Petitioner, in printing the Opinion of the Court of Appeals, in his Supplemental Appendix, has failed to include the Appendix to the Opinion. Therefore, Respondent has printed that portion of the Opinion which was omitted by Petitioner.

APPENDIX—Continued

dent in April, 1976 at a meeting of Fathers United for Equal Rights (FUER), he asked Respondent how much Respondent would need "for the case" and he says he was told "about $1,000.00" by Respondent (court costs would be extra). Draper asked Respondent "... is that good? You know, is that what I can count on? And he said yes." According to Draper, Respondent also told him he (Respondent) would need a $500.00 retainer "to start procedures." Shortly thereafter (April 15, 1976), he obtained a $500.00 Money Order and sent "your retainer of $500.00" to Respondent together with the original of the Decree on approximately April 16, 1976. On May 14, 1976, Respondent filed a petition on behalf of Draper, to modify the custody part of the Decree. Respondent specifically signed his (Respondent's) name to the petition which, *inter alia*, stated that the Decree (sought to be modified) "awarded custody of the minor child ... to (Marlene)."

In the latter part of 1976, Draper received a bill from Respondent (dated July 28, 1976) stating "BALANCE NOW DUE" $460.00 to which he responded by purchasing a Money Order for $460.00 on September 7, 1976. He and Respondent had "set up a date" because Draper wanted to discuss the case with Respondent and so Draper went personally to Respondent's office. When Draper got there, Respondent "wasn't there so I paid his secretary the money." At Draper's request, Respondent's secretary gave Draper a receipt which stated, *inter alia*, "Balance Paid" (he asked "to make sure everything was paid and that I had proof of it").

In August, 1976, Draper heard that Marlene had moved out of Maryland and that the child was living in a "bad environment." He went to Syracuse, New York on August 21, 1976 (where the child and Marlene resided) with Marlene's estranged husband and two male friends and "we rushed in and obtained my child." This retrieval was in flat violation of the Decree. On September 3, 1976, Respondent, on behalf of Draper, filed a "petition for immediate hearing" asserting that Marlene was living with a "boyfriend" charged with rape and breaking and entering "who beat the child" and asked for an immediate hearing (for change of temporary custody) because "this is an emergency situation." Although Draper swore to these "facts" on August 31, 1976, by way of attached Affidavit, neither he nor Respondent informed the court of the illegal child snatch. Thereafter, Marlene filed a petition for contempt on September 30, 1976, asserting that she had moved to New York to "avoid continued harassment" by Draper and that he "broke into her apartment in Syracuse, New York and assaulted her and snatched the child out of her bed." On March 23, 1977, after hearing, the Decree was modified by granting custody of the child to Draper .... The next day Respondent billed Draper $850.00 for "additional final fee based on fully successful conclusion of case" whereupon Draper wrote Respondent a letter of outrage informing Respondent he did not "intend to pay a cent" and was "taking this matter to the American Bar Association."

In April, 1977, Draper wrote Respondent discharging him as Draper's attorney. (The Court of Special Appeals meanwhile reversed, *Draper v. Draper*, 39 Md.App. 73, 382 A.2d 1095 (1978), and on remand, Marlene was granted custody of the child by subsequent decree of April 14, 1978 .... On June 6, 1977, Draper filed complaint with the Attorney Grievance Commission.

The sole dispute is whether Respondent told Draper that the (about) $1,000.00 was a "flat fee" or whether it was a retainer. Respondent contended he had a retainer arrangement and that there never was a "flat fee basis." He testified that custody cases are unpredictable and that he rarely represented custody cases on a flat (or "set") fee basis. He argued that when his secretary gave Draper a receipt marked "Balance Paid", she was "newly hired, had not been authorized to determine when any fee was paid in full and had never before given a receipt to a client." He referred to his "temporary note" which purported to show "Retainer fee $950, $500 down" and bill of June 23, 1976 which purported to be a bill from him to Draper indicating a "Retainer Fee" of $950.00.

APPENDIX—Continued

His theory was that there was an "implied contract" between himself and Draper and that it was proper (under a "DR Rule" which he did not number) to charge the additional fee "based on the successful result–that he obtained custody." At other times, Respondent believed he had a "verbal agreement" as to fees.

Draper denied receiving the June 23, 1976 bill from Respondent and when Draper testified at instant hearing, Respondent did not cross examine him about it. When Draper wrote his letter of outrage to Respondent, he specifically informed Respondent that he had paid Respondent a total of "$960.00 which *you* quoted to me. The total which you want would bring the amount to $1,810.00 which is double and not what was told to me." He told Respondent he "*had* great trust and respect for you ... but I am very disappointed." Respondent responded to the letter of outrage by his (Respondent's) letter of April 25, 1977 to Draper which expressed surprise that Draper would question the additional $850.00 bill and Respondent was "rather offended" at Draper's suggestion of "overcharging." Yet Respondent nowhere mentioned the June 23, 1976 bill (which would have cleared up the matter, it would seem).

In addition, Respondent's notion of an "implied" contract leaves much to be desired. As an attorney with thirty years experience dealing with a (high school educated) plumber, the client was at Respondent's mercy. He furnished his client with no guidelines as to what future fees would be and the "additional" $850.00 bill was devised solely by Respondent. At no time did Respondent discuss the additional fee with his client before he sent it for payment. A short and simple letter to Draper setting out the fee agreement alleged by Respondent would have obviated any misunderstanding. Respondent's failure to observe the plain common sense of Ethical Consideration 2-19 left much to be desired as has been said.

Conclusion of Law

Despite all of the highly suspicious circumstances, I cannot find by *clear and convincing evidence* that Respondent intended to improperly charge a fee to Draper in violation of their fee "agreement." Respondent is entitled to the presumption that Draper received the June 23, 1976 bill and Draper's denial of receipt (*by way of answer to interrogatories*) is simply not sufficient to overcome the finding that Respondent sent it and Draper received it. If Draper received it, he was on clear notice that the payment of $960.00 was a retainer and not a "flat fee."

Issue Two–Did Respondent violate DR 2-110(A)(2) by allegedly refusing to deliver to Draper, the decree of modification (or copy) of March 23, 1977 (awarding custody to Draper–the result sought by Draper and objective in his hiring Respondent) after the modification hearing and after Draper discharged Respondent? Did he further violate said Disciplinary Rule by not avoiding foreseeable prejudice to Draper before he withdrew his representation of Draper and by doing nothing for Draper in the face of danger of additional litigation?

Findings of Fact

Draper discharged Respondent as his attorney in April, 1977. On May 13, 1977, Marlene's attorney wrote Respondent concerning certain visitation problems. Respondent then wrote Draper, on May 23, 1977, telling Draper to give the matter his earliest attention (he also said he didn't wish to become involved "in any further services upon your behalf" because Draper refused to pay the "reasonable final fee bill"). At all of these times, Respondent did nothing on behalf of Draper. Respondent then filed a form, "Motion to Strike Appearance" on June 2, 1977 and on June 20, 1977, leave was so granted.

Previously, Draper asked Respondent for a copy of the "Decree" (meaning the Decree of Modification whereby the court awarded custody of the child to him). Obviously Draper needed the Decree to prove the legal validity of his custody. Respondent refused stating he would obtain it when the "outstanding" bill was paid. He asserted an "attorney's lien."

APPENDIX—Continued

Conclusion of Law

Despite Bar Counsel's contention that Respondent violated DR 2-110(A)(2) (because the fee was outside the scope of their agreement" and hence the attorney's lien was an "improper assertion"), I do not conclude that Respondent did so violate it. When Respondent received the letter from Marlene's attorney, he promptly wrote a letter of alert to Draper. As to the attorney's lien, it is recognized in Maryland. *Attorney Griev. Comm'n v. McIntire*, 286 Md. 87, 405 A.2d 273 (1979) as a "passive lien on the papers, securities and money belonging to a client coming into the lawyer's possession." The Court of Appeals in *Ashman v. Schecter*, 196 Md. 168, 173, 76 A.2d 139 (1950) also mentions "all papers, securities and money" referring to them as "such things." While the Disciplinary Rules state that the attorney shall "delive[r] to the client *all* papers" (emphasis supplied), the appellate decisions also state the right of an attorney to retain *all* papers, *id.* at 173, 76 A.2d 139. If the purpose of the lien is to protect an attorney from non-paying clients, then it cannot be said that Respondent improperly asserted the attorney's lien.

If I cannot conclude by *clear and convincing* evidence that Respondent charged an improper fee, then I cannot conclude by clear and convincing evidence that Respondent improperly retained the Decree.

Issue Three–Did Respondent not violate DR 6-101(A)(2) by lack of adequate preparation, in that he never conducted discovery, never interviewed any witnesses nor had in person interviews?

Findings of fact

All of the findings of fact set out [previously relative to the Draper complaint] are incorporated in instant findings of fact.

The face to face contacts between Respondent and Draper were as follows:

a. Brief discussion at FUER meeting in April of 1976 dealing with fee.

b. Twenty minutes on November 18, 1976 when a "merits" hearing on the modification petition was to take place. It never took place.

c. Hearing on modification petition on March 23, 1977.

Other than these, most of Respondent's contacts with Draper were by telephone calls to his staff and letters.

There was only one adversary hearing in the Draper case, that on March 23, 1977–the matter of Draper's modification petition (when Draper was absolutely divorced, he was not represented by Respondent but by Stanley Sollins, Esq.). After Draper was cited for contempt when he "violated a court order by grabbing the child in New York," there is no record of any hearing on the specific issue of contempt (nor was Draper ever found guilty of contempt).

Respondent produced two witnesses at this March 23, 1977 hearing: Draper and one Bertha Tawney. As to Bertha Tawney, Respondent did not interview her before he put her on the stand. Respondent feels that "personal interviews are not necessary" (of witnesses before trial) nor did he conduct any in the Draper case. He conducted no discovery either, that is, he filed no interrogatories, notices for production, etc., requests for admission, nor conducted any depositions.

The custody report of Judith Finn (a social worker of the Anne Arundel County Department of Social Services) was received in Draper's case. It recommended that Draper receive custody of the child and the trial court, relying heavily on her report, awarded custody of the child to Draper. The trial court would not allow Marlene's attorney to cross examine Ms. Finn during Marlene's case but, on appeal, the Court of Special Appeals stated that "a court appointed investigator in a custody case occupies the position of an officer of the court and at the request of either party, may be called as the court's witness, subject to cross examination by both parties." *Draper v. Draper*, 39 Md.App. 73, 81, 382 A.2d 1095, (1978) (the trial court was reversed on a different ground). After hearing, the court decreed custody to Marlene on April 14, 1978 and there was no appeal

APPENDIX—Continued

nor have there been any proceedings since then.

While Respondent's representation of Draper is surely not a paradigm of competence or adequacy, this court cannot find by *clear and convincing evidence* that he handled the *Draper* matter "without preparation adequate in the circumstances."

His failure to interview personally Bertha Tawney, for example, was of obvious detriment to his client because Respondent was forced to claim "surprise" after her first substantive answer. If he had interviewed her (or taken her deposition), he would have known, at the outset, that she was not present at time felt to be significant by Respondent. Actually, the "surprise" rule was not applicable because Respondent had never even talked to his *witness* (he only had talked to *Draper*). The refusal of an attorney to personally interview a witness can logically lead to problems (sometimes severe) because the attorney is left to rely only upon the biased version furnished by his client–a version that may not be true nor accurate. That is precisely what happened with Bertha Tawney because when Respondent claimed surprise, the trial court asked, "This is a different story than what you were previously told?" and Respondent was obliged to reply, "By my *client*. yes" (emphasis supplied). (Respondent wanted to show that when Marlene came to the house with a policeman, the child ran to Draper.) When Bertha Tawney said she was not present at that particular time, Respondent was forced to desist from further questioning. (He never produced the policeman as a witness either.)

In addition, the failure to know what your witness will say in testimony can waste everybody's time: the court's, the witnesses, the attorneys and the parties. It is to be noted that *Respondent* understood the value of discovery as when he remonstrated with an opposing lawyer . . . in the Draper hearing ("If you spent a little more time on interrogatories and more preparation, you might be . . ."). Respondent asserts that in custody cases "You don't know how many witnesses the other side is going to produce in a domestic case and particularly in a custody case. You don't know what the facts are going to be, you don't know how they are going to expand by the time the case comes along." However, if he had filed interrogatories, he *would* have known how many witnesses and what the facts would be; if he had interviewed or deposed witnesses he could prevent them from "expanding." Respondent himself makes out a persuasive case of his own inadequacy.

Nor is Respondent's assertions that he "won the case" convincing. The essence of the trial court's decision to award Draper custody was based upon the social worker's report ("The court relies heavily on the report of Judith Finn and the Department of Social Services," *Draper v. Draper*, 39 Md.App. 73, 77, 382 A.2d 1095 (1978)). One might say that the *report* won the case for *Draper*. No matter what was responsible for the "win," it was short-lived in any event because Draper no longer has custody (the trial court was reversed and the child is now in the custody of her mother).

Conclusions of Law

However, this court cannot find by *clear and convincing* evidence that Respondent's representation was *so* inadequate as to conclude that he violated DR 6-101(A)(2). While Respondent's failure to utilize obvious tools was probably dictated by his desire to avoid costs (he claims he would have to pass on such costs to his clients) the line between trial tactics and adequacy of preparation can sometimes be blurred. Experts in the field of family law feel that the "first interview" is of tremendous significance. They advise *office* interviews of a minimum of one to two hours uninterrupted by any distractions.

Contrast that with Respondent's telephone theory, "It is totally unnecessary for human beings to communicate information one to the other, that they be in the same room and it has not been so since the invention of the telephone and in fact far before." In fact, Respondent is apparently proud of his lack of office interviews even boasting that some of his *clients* "never see him until the day they go to court."

APPENDIX—Continued

Respondent's irresponsible boast that some of his clients never see him until the day of trial can easily backfire on him. In fact, conduct even less reprehensible may subject an attorney to malpractice. *Compare Bevevino v. Saydjari*, 76 F.R.D. 88, 96 (S.D.N.Y.1977) (attorney's failure to prepare defendant's doctor for his deposition prevented him advancing a valid defense-court suggests malpractice suit to doctor). On the other hand, the conscientious attorney must not be required to spend his (and his client's) money needlessly. Nor should there be overdiscovery. J. L. Ebersole, *Discovery Problems: Is Help on the Way?* 66 A.B.A.J. 50 (Jan., 1980). But note the word "conscientious" however. This should require, *de minimus*, an effort to inform the client and involve him in decisions about discovery. Regular discussion will not just make it harder for clients to complain later, but will generate sympathy for the attorney who treats his client as a person in a mutual undertaking rather than as a child. While a *reasoned* decision as to whether to pursue a particular avenue of discovery is within an attorney's discretion, *Identiseal Corp. v. Positive ID Systems*, 560 F.2d 298, 302 (7th Cir. 1977), certainly the *total* absence of discovery may well be outside the bounds of discretion. *See generally* W. Barthold, *Negligence in Discovery: No Paper Tiger*, Litigation, vol. 6, Fall 1979 at 39.

It must be noted, however, that Bar Counsel has specifically dropped the "neglect" violation against Respondent leaving only the inadequate preparation charge. Since Respondent knew he had a favorable report from the Department of Social Services and since he may have anticipated that the judge might be favorably impressed by the neutral and experienced source, it cannot be said that he was required to have prepared additionally. I really cannot conclude by clear and convincing evidence that Respondent has violated the latter rule *under the circumstances*.

Moreover, the "inadequacy" Disciplinary Rule nowhere spells out any guidelines for instruction in this Orwellian field, Brown, *ABA Code of Professional Responsibility: In Defense of Mediocrity* 5 Valparaiso L.R. 95, 99 (1970), and before one may find *punishable* inadequacy, a stronger case must be presented. Some observers feel attorney conduct must reach proportions of grossness. 24 Hasting L.J. 675, 693 (1973), while others feel the standard of care may be more closely akin to negligence. Zilly, *Recent Developments in Legislative Malpractice Litigation* (*Litigation*, Vol. 6, No. 1, Fall 1979 at 8, 17, 64). The American Bar Association Committee on Ethics and Professional Responsibility declined to give meaningful responses to various questions that could have provided a more workable definition. The "inadequacy" Disciplinary Rule is vague and general. Canon Six's *Ethical* Considerations nowhere enlightens us as to the meaning of "inadequacy." No mention is made of duties of investigation and preparation, conferring with the client "early and often," frequently advising him ascertaining and developing strategies, filing appropriate motions (to produce, to request admission of genuineness and authenticity), the duty to personally interview clients and witnesses and the duty to file interrogatories and when necessary, take depositions. One wants to raise the competency of attorneys to at least a minimum level but one also worries about the lack of specificity of the inadequacy Disciplinary Rules. See generally Morgan, *The Evolving Concept of Professional Responsibility*, 90 Harv.L.Rev. 702 (1977).

In sum, while Respondent's representation was spotty and somewhat deficient, this court cannot find by *clear and convincing evidence* that Respondent handled the Draper case without preparation adequate in the circumstances.

Issue Four: Did Respondent violate any Disciplinary Rule by advising Draper to retrieve (meaning illegally child snatch) the child from Syracuse, New York in flat violation of an unmodified court decree awarding custody of the child to Draper's former wife (mother of the child)?

Findings of Fact

The Decree of January 7, 1975 unequivocally granted Marlene custody of the child

APPENDIX—Continued

with reasonable visitation rights to Draper. From January 7, 1975 to August 21, 1976, there was no modification of the Decree. Draper met Respondent in April, 1976 and retained him to "change custody" because he felt the child was living in an "unfit environment." After Draper paid Respondent his fee, Respondent filed a petition for modification on Draper's behalf on May 14, 1976, asking that Draper be awarded custody. On May 17, 1976, the court, per the clerk, issued an Equity Subpoena to Marlene at 139 Rigi Avenue, Syracuse, New York 13206 (to Answer or defend).

In early August, 1976, Draper was told by his former mother-in-law that Marlene had moved out of the state and that she was living with a criminal. Draper twice consulted with Respondent on the telephone in early August, 1976 asking him if "something could be done about this." Respondent suggested that Draper get the child "but not to say anything to anybody about it, because it was not the procedure of attorneys." Respondent told Draper [, according to Draper,] that when he went, "not to make it a breaking and entering charge type of thing but to try to get in without breaking the door down, and, you know, just get my child." Respondent also told Draper that if he (Draper) were successful "we might get a faster response from the court" and that it might show "good concern on my part." On August 21, 1976, Marlene was living with the child in Syracuse, New York (and a man named Jerry Cushman–*later* convicted of breaking and entering).

On that date, Draper went to Syracuse, New York with the estranged husband of Marlene . . . and two other males ("case her boyfriend gave us some trouble") and "we rushed in and obtained my child" (from her bedroom).

On September 3, 1976, Respondent filed, on Draper's behalf a petition for immediate hearing asking for a change of temporary custody "because this is an emergency situation." He mailed it to Marlene on August 31, 1976 just ten days after the child snatch. The upper left of the petition indicates it was typed three days after the child snatch (August 24, 1976). Neither Respondent nor Draper advised the court of the physical seizure of the child. On September 30, 1976, Marlene petitioned to hold Draper in contempt and on the same date, the court . . . ordered Draper to return custody of the child to Marlene pending litigation of the matter of modification. On March 23, 1977 after hearing, the trial court awarded custody of the child to Draper . . .; his decree was reversed by the Court of Special Appeals, *Draper v. Draper*, 39 Md.App. 73, 382 A.2d 1095 (1978); and on April 14, 1978, the trial court . . . awarded custody of the child to Marlene with reasonable rights of visitation to Draper. The matter thus came full circle.

I find as a fact that on May 14, 1976, Respondent knew of the Decree. Aside from the fact that Draper sent it to him in April, 1976 when he paid Respondent his fee, the petition for modification prepared, drawn and filed by *Respondent*, "moves that this court modify its Decree concerning child custody," says the parties were divorced by "Decree . . . dated January 7, 1975" and prays the court to modify "its" Decree. Although Respondent seemingly denied seeing the decree till he gave his deposition (in the instant case in 1979), he acknowledged that "this was besides the point, because my notes show that the wife had custody" and "that would sort of indicate that Mr. Draper would very well have given me those papers, but at any rate, I was accurate that Mr. Draper's wife had custody."

I find as a fact that in August, 1976, Respondent did suggest to his client, in flat violation of the Decree, that he (Draper) physically take the child from the Syracuse residence where she was living with her mother; that it was Respondent's and not Draper's suggestion; that Respondent told Draper to not make it look like a breaking and entering but just to get the child; that if it was successful, "we" might get a faster response from the court and it would show good concern on Draper's part; and that Respondent told Draper not to say anything to anybody about it. I find further that the

APPENDIX—Continued

idea of taking [Marlene's estranged husband] and the two men was Draper's, not Respondent's (but that Draper's idea emanated directly from Respondent's suggestion that Draper not break in. Thus Draper took Marlene's estranged husband to trick her into opening the door).

At first, Respondent denied that he had advised Draper between April, 1976 and August 21, 1976 that he should "retrieve" the child then in Marlene's custody as per the Decree ((i) "False. The Respondent does not remember using any such quoted imprecation to Mr. Draper . . ."). However, he later shifted ground, admitting he *had* used the word "retrieve."

I find as a fact that Respondent testified before the Inquiry Panel on January 28, 1978 as follows:

1. "... when you have performed a child snatch, as any number of my clients, on my advice, have done . . ."
2. "... Now we had that hearing and then–oh, before that I had planned carefully with Mr. Draper just how he was to retrieve the child. Well, first of all, whether to retrieve the child and the answer to that was clear. And we planned how to retrieve the child."
3. "I think I did more than he realizes. There was the pre-planning, there was the snatch, there was this first hearing."

Despite the Respondent's protestations that when he said "retrieve" what he really meant was to *legally* retrieve, his testimony is fatuous and entirely unconvincing. He testified that in his view, retrieval means:

"the legal plan, the pleadings that would be filed, the setting of having the case brought promptly before a judge, also the legal possession that would be established that Mr. Draper, having a right to reasonable visitation, which has been denied him, had a right also. This legal position is what was carefully planned on retrieving the child, that is, retrieving the child back into his court ordered custody is what I'm talking about. I'm talking about getting the child ordered by the court in a decree to be turned over to the custody of Mr. Draper."

He testified further that:

"I was planning with him, and preparing myself, for the legal position that since he had the right to reasonable visitation and since the child was being held with a promiscuous mother, living in the same [home] with an alleged felon, that for him to ask to take the child back from here for his visitation is one thing he could have done, that was part of the planning . . . Another part of the planning was to try to get an immediate court order concerning return of the child."

However, it is clear that a commonsense view of Respondent's (Inquiry Panel) use of the word "retrieve" is that he meant to *physically take* the child. Aside from common sense, Respondent (himself) *invariably* uses the word "retrieve" to mean *take*:

1. "I'll have to ask the court to bear with me. I'd been here about ten minutes early, and at that time was unable to retrieve my files."
2. "Did I throw them in the waste basket? Have I retrieved them from the garbage dump or what?" (Respondent is the questioner).
3. "Q. How were they brushed aside physically, you tell us.
   "A. You put your hand out and pushed them aside.
   "Q. Where did I push them to?
   "A. It would have been over in front of me or over towards the center of the table.
   "Q. Did I then use those notes later in the trial or not?
   "A. I don't believe so. You may have. I don't believe you used those in the way I'm talking about.
   "Q. Did you retrieve them?
   "A. Did I what?
   "Q. Retrieve them?
   "A. Oh. Thank you. No sir. You retrieved them. You showed them in court." (*Respondent* is the questioner).

APPENDIX—Continued

4. "He goes and retrieves his child . . ."
5. "Just that at the time the child was retrieved . . ."
6. "Yesterday evening I went down to my basement and was able to retrieve a file."
7. In his deposition, he testified that "Draper has been on the risk to retrieve the child* from New York" but "explains" that "it was not a careful and an accurate use of the word."

His labored and tortured attempts to explain away his earlier sworn *testimony* (before the Inquiry Panel) are totally unconvincing. He refers to a Random house dictionary definition but must acknowledge that the first definition is "recovered, regain." He then twists the word to mean that Draper was trying [to] retrieve his visitation right. *Draper*, however, clearly stated that the purpose of the child snatch was *to remove the child from the bad environment (not visit)*. . . .

If he meant "retrieve" in the sense of obtaining a valid court order, he does not explain why there was no hearing *before* Draper retrieved the child. As to the petition for immediate hearing, it was filed *after* the retrieval thus further negating Respondent's motion of *legal* recovery. Respondent speculates that the petition could have been dictated before the retrieval but here too his position is unconvincing. If indeed his secretary was slow in typing this petition, surely Respondent would have known when he filed it (September 3, 1976) that the retrieval had already taken place. Respondent tries to argue that the petition was sent to Draper for his signature but one wonders why such a slow process was used if there was such an emergency. I find as a fact that Respondent know of the retrieval (on August 21, 1976) at the time he filed the petition for immediate hearing (September 3, 1976). If Respondent's *legal* theory is correct, why would he not have obtained a *signed* court order in Maryland awarding temporary custody to Draper so that the New York authorities could honor it? In fact, Respondent offered into evidence exactly such an order but it was never signed by any court because it was never presented to any court.

Respondent's visitation theory is totally unsupportable and totally unconvincing. A non-custodial parent simply cannot take three men with him and physically grab a child out of her bed because he feels the custodial parent unfit. If he does so, *his* visitation rights may be completely denied. *See Friedland v. Friedland*, 174 Cal.App.2d 874, 345 P.2d 322 (father told friend "one way or other we will get the child" and had on several occasions broken into the custodial mother's home–visitation denied). Even if visitation rights are not denied (*Anderson v. Martin*, 257 S.W.2d 347 (Tex.Civ.App. 1953)) *reasonable* visitation is not to be equated with a bald and illegal child snatch.

Respondent is obliged to admit that he advised any number of his clients to perform child snatches, yet he tried to expiate his admission by saying he only meant legal child snatches. By legal, he says he means taking your child *before* there is a court order. He acknowledges, however, he made an "unfortunate choice of words" and he further acknowledges that he is "not saying that it (child snatch) cannot cover an illegal one." His explanation is fanciful and absurd. He is hoist by his own petard.

It is interesting to note that when Draper testified at the March 23, 1977 hearing as to why he snatched the child, he testified that *he went on Respondent's advice*. Thus Draper's exact same version was given before Judge Beardmore *at a time when there was no complaint by him against Respondent*, the same version was given before the Inquiry Panel; and the same version was given in instant case. Draper's testimony is entirely consistent and credible as opposed to the testimony of Respondent–testimony which is riddled with self-contradiction, inconsistency and illogic. It is further interesting to note that when Respondent him-

* Respondent's use of "retrieve" in his everyday use is thus equated with his use of "retrieve" as concerns Draper's *physical taking* ("on the risk to *retrieve the child*") (emphasis supplied).

APPENDIX—Continued

self alluded to the fact that his client Draper testified that he (Draper) acted "on counsel's advice," Respondent did not contradict Draper at all. In fact, he (Respondent), suggested "it was an emergency situation . . . he (Draper) was doing the right thing."

On direct examination, Respondent testified that he *never* advised a client to child snatch if there is a court order. However, Bar Counsel produced a former client of Respondent's (William Brecka) who testified that when he asked Respondent to represent him, Respondent told him in December, 1975, he would have to dismiss his then attorney have a fee of $850.00 or $950.00 and "would have to be willing to do anything that was necessary to get custody of the children." When Brecka pointblank asked Respondent what he meant, Respondent replied "I will deny it if I am asked, but you have to get the children and keep the children and go as far away as possible and stay away as long as possible." When Brecka told Respondent he was going to take the children to Charleston, South Carolina, Respondent told Brecka "Don't tell me, I don't want to know. Just tell me when you're going." (Brecka did take his three children to South Carolina and kept them in Charleston for five or six weeks but flew back to Maryland, the children returning with their mother).

Respondent felt this evidence was inadmissible. However, a witness may be contradicted on collateral matters that are relevant to the issue on matters brought out in direct examination of the witness. *See generally* 98 C.J.S. *Witnesses*, Sec. 633 at 653 [(1957)]. It was Respondent who first testified on direct examination that he had never advised a client to child snatch if there was a court order, thus offering his probity and consistency for the consideration of the trier of fact. Surely Bar Counsel can try to contradict particularly when the matter of child snatch and child custody constitute the basic issue. *cf., Walder v. U. S.*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954) (on direct examination, defendant said he had never sold narcotics in his life; in rebuttal government allowed to produce officer to testify he had seized heroin from defendant's home at unrelated time); *see also U. S. v. Epps*, 438 F.2d 1192 (4th Cir. 1971); *Krider v. Hempftling*, 137 S.W.2d 83, 86 (Tex.1940) (where one party offers evidence in regard to irrelevant matter, other party may not only inquire about it but he is entitled to offer evidence otherwise inadmissible).

Brecka also testified that Respondent "would, occasionally step over the line of from walking that fine line right on the edge of the truth or truth if you wish to put it that way, stepping over and stepping back" and "he is basically truthful, with a reservation that he would not tell you the whole truth and that he could lie but on balance, he is truthful." Brecka was a self-employed building developer. He, other members of FUER and Respondent went to FUER meetings in Baltimore City, Howard and Montgomery Counties. The Brecka testimony was admitted solely for the purpose of credibility and has not been considered substantively. Finally, the evidence against Respondent is so overwhelming otherwise, that even if the Brecka testimony were inadmissible, it would make no difference at all.

Conclusions of Law

This court finds by clear and convincing evidence that Respondent's conduct was in violation of Disciplinary Rules 1-102(A)(1), 1-102(A)(4), 1-102(A)(5) and 1-102(A)(6).

1-102(A)(4)

A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

He practiced a fraud on the court which issued the decree of January 7, 1975 by suggesting, planning and helping to carry out an illegal and invalid child snatch in violation of the decree. He encouraged his client to violate the decree and he filed pleadings designed to consummate the violation.

1-102(A)(5)

A lawyer shall not engage in conduct that is prejudicial to the administration of justice.

APPENDIX—Continued

Respondent's conduct in calculatedly planning the violation of the decree is obviously conduct prejudicial to the administration of justice. Illegal child snatching has reached epidemic proportions (Baltimore *Daily Record*, February 5, 1980, vol. 184 No. 30 at 1) and conduct such as Respondent's strikes at the heart of the administration of justice. *Respondent* himself is aware of this ("The purpose of establishing Courts ... is to prevent ... people from engaging in self help. In the old days before there were courts, people would shoot each other ... this is uncivilized.)

1-102(A)(6)

A lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law.

Respondent's conduct quite clearly reflects on his fitness to practice law. For partisan purposes, he flouts the law. In so doing, Respondent tramples on the rights of the custodial parent and brutally deprives her of her child on the mere say-so of the non-custodial parent. The non-custodial parent-spurred on by Respondent-takes a young child without affording the custodial mother a chance to be heard. For her, due process is non-existent. Respondent also bulldozes the courts whose decrees are reduced to a nullity by him. Respondent's mentality leads him to conclude that "court orders are not holy writ." While they are obviously not, they must be obeyed for the clear reason that if everybody did what Respondent did, chaos would surely ensue.

1-102(A)(1)

A lawyer shall not violate a Disciplinary Rule.

Since the above Disciplinary Rules have clearly been violated, Respondent has therefore violated above Disciplinary Rule (a lawyer shall not violate a Disciplinary Rule).

Finally, I find by *clear and convincing evidence* that Respondent violated Disciplinary Rules 7-102(A)(7) and 7-106(A). (See [prior] discussion).

THE MALCOMB CASE

Issue One: Did Respondent violate any Disciplinary Rules by making an agreement with Malcomb that his representation of Malcomb would cost $1,000.00 and yet intended, at the time of the agreement, to charge an additional fee based on certain factors, including a successful result?

Findings of Fact

John D. Malcomb (Malcomb) ... was formerly married to Merle Burgess (Merle) on July 14, 1963 and two girls were born as a result: Kirsten, born April 26, 1965 and Heather, born April 13, 1968. In March, 1973, Malcomb and Merle separated and on March 29, 1974, they were absolutely divorced. The Decree provided that the custody of the children was awarded to Malcomb with the right to Merle to visit at reasonable times. Their separation agreement of January 16, 1974 was made a part of the Decree and it stated, in pertinent part, that Malcomb should have custody of the two it being agreed that Merle

> "is not waiving her right to the custody ... but that both ... feel that it would be to the best interest of the children at this time if the two children ... were in the ... custody of (Malcomb). (Merle) reserving the right to take custody of the two children at such time as her situation may change and as long as it will be in the best interest of the children."

... In November, 1974, Malcomb remarried (Kathleen).

In December, 1974, Merle (who had also remarried) had an attorney write Malcomb that she wanted to regain custody of the children and Malcomb selected Respondent to represent him. Respondent wanted a $500.00 retainer which Malcomb sent him. Respondent sent a copy of Respondent's letter to Merle's attorney (a Mr. Pryor) to the effect that Malcomb had no intention of changing the agreement. Since Kathleen was ill, Malcomb decided not to continue with the case and Respondent agreed (to drop the case) and sent a $200.00 refund to Malcomb in early January, 1975.

APPENDIX—Continued

In the Fall of 1975, Merle tried to keep the children from Malcomb who then consulted a different attorney (Richard G. Bartholomee, Esq.). Over the Thanksgiving holiday of 1975, Malcomb had let the children visit with Merle but Merle insisted on keeping Heather contending she was ill (Malcomb did get Kirsten back). Malcomb became suspicious and called the doctor who said Heather was not ill. Although Malcomb again consulted Bartholomee, he did not react adequately, according to Malcomb. Malcomb then contacted Respondent to represent him to get Heather back.

The above constitutes undisputed facts. The following paragraph constitutes Malcomb's contention (disputed by Respondent). Respondent said it would be an uphill battle "and it is going to cost you $1,000.00." Respondent agreed to accept $500.00 in a few days, the rest in a couple of months "as long as I paid him the whole amount before the thing came to court."

It is undisputed that after Malcomb paid Respondent the $1,000.00 (received by Respondent on December 16, 1975, February 11, 1976 and April 6, 1976), Respondent's bookkeeper marked the deposit "Paid in Full."

It is undisputed that Respondent then sent Malcomb a copy of a letter from the court (re trial on April 30, 1976) with a typed note from Respondent stating, *inter alia*, that "It would be appreciated if the balance of my fee [$500.00 bal] could be paid before trial." Malcomb then sent the additional money as the result of receiving that document.

It is undisputed that the April 30, 1976 hearing was reset for June 8, 1976. On that day, the hearing took place (Judge H. Kemp MacDaniel presided) and lasted one day. The judge did not reach a decision that day. Respondent sent Malcomb a $650.00 bill dated June 23, 1976 marked "Further retainer" received by Malcomb on the 25th "probably."

Malcomb contends he disagreed with the bill and intended not to pay it but he felt that with Respondent's attitude and the problems he had, "it was best to at least pay a token amount and then discuss the rest . . . of the fee with him after Judge MacDaniel had made his final decision." He paid him $50.00.

It is further undisputed that sometime after June 23, 1976, Respondent sent to Malcomb a copy of a June 23, 1976 letter from Respondent to Judge MacDaniel confirming that the hearing set for July 12, 1976 would be instead on Tuesday, July 20, 1976 . . . (attached was a note dated June 21, 1976 from the judge stating that on "June 8, 1976 a hearing on Petition for Modification of Decree and Petition to return child held sub curia pending further evaluation by the court . . .)."

Malcomb contends that because the June 23, 1976 letter had a note by Respondent asking Malcomb to call him (Respondent), he attempted to contact Respondent but he was not able to. He waited several days after the July 20, 1976 hearing date, but didn't hear from Respondent. He attempted to call him but was not able to reach him so he called Merle and asked her if she had heard anything about the decision. Merle said, "Of course, don't you talk to your attorney? The judge gave me custody of Heather and you keep Kirsten and you pay me $25.00 a week support" (meaning for Heather). Malcomb also called Merle's attorney (William Hammond, Esq.) (Hammond) "because I wanted to get it from a totally credible source."

On July 27, 1976, Malcomb and Kathleen saw Respondent at a meeting of FUER at a church in Baltimore and he contends Respondent said:

> Oh, Mr. Malcomb, I have been meaning to call you, that I am still working on the case. And I said, Working on it? I thought it had been settled? He said, Settled? Nothing is ever settled. It is still up in the air. It is touch and go. I have been meeting with the Judge and trying to get it worked up. You know, Judges are very reluctant to divide custody of children.

Malcomb contends he was confused and so the next day (July 28, 1976), he called

APPENDIX—Continued

Judge MacDaniel's office to talk to the judge's secretary (to ascertain if a decision had been rendered). Actually, the judge answered and although he was reluctant to talk with Malcomb, Malcomb explained the situation and asked one question, "did you make this decision on the 20th of July and was this your decision." The judge told Malcomb "yes." The next day, Malcomb called Respondent who told Malcomb he had talked to Judge MacDaniel that day (July 29, 1976) and the judge told Respondent that he was ready to sign an order giving Malcomb custody of one daughter and Merle custody of the other" if I was willing to pay $25.00 a week support." Malcomb told Respondent he (Malcomb) had already agreed to that "as he (Respondent) knew" whereupon Respondent became very agitated and angry. Malcomb was finally able to calm Respondent down and after he asked Respondent what to do, Respondent said he felt $25.00 was outrageous and we ought to request another full scale hearing to reduce support because of Merle's earning capacity. When Malcomb asked Respondent why Respondent hadn't contacted Malcomb about the outcome of the case, Respondent became very belligerent and said, "I never did like you, you little bastard . . . you are just trying to get out of paying my fee." He threatened suit and slammed down the phone.

In is undisputed that Malcomb was quite angry and wrote Respondent a July 29, 1976 letter pointing out that since Respondent knew full well that the judge's ruling (Kirsten to Malcomb; Heather to Merle; $25.00 per week child support for Heather to be paid by Malcomb) "was the precise arrangement that I had been trying to work out for almost a year . . . you knew . . . I was willing to share the custody with Merle . . . I only went to court when she tried to take both of the children." Malcomb further accused Respondent of a contemptible and brazen attempt to string him along after Judge MacDaniel had made his decision on July 20, 1976 and saw no reason to continue "our relationship." He informed Respondent that since he had paid Respondent "Your fee of $1,000.00 (which you quoted to me on the phone and insisted be paid before the June 8 hearing)" he saw no reason to honor the "further retainer" of $650.00.

It is further undisputed that the very next day (July 30, 1976) a letter was sent by Respondent to Judge MacDaniel enclosing a copy of a proposed Order endorsed "approved as to form." He explained that the reason for his "slight delay" was to discuss with Malcomb the support provision ("to permit him to reflect" since Respondent found the "fact situation" quite equivocal as to whether Malcomb had to make any payment for support) and to have Malcomb's decision in writing. Respondent told the judge he understood Malcomb called him (the judge) and suspected he said a number of "derogatory" things about Respondent. He then stated that Malcomb "has his own highly personal reason for wishing to have this order signed *in haste* and which I do not wish to discuss further."

It is Malcomb's contention that there was no "discussion" as mentioned in Respondent's July 30, 1976 letter (except for Respondent's mentioning the $25.00); and as to Respondent's statement that he "was taking the time to transmit to him and receive back a communication," Malcomb testified there were no communications at all.

The following in undisputed, namely, that Respondent then sent Malcomb an August 3, 1976 letter stating that although Malcomb was willing to pay $25.00 per week for Heather's support, Respondent felt the requirement to do so to be "entirely unreasonable and unfair" (because of Merle's earning capacity of around $10,000.00 and her husband's salary). He asked Malcomb to confirm in writing his acceptance of Judge MacDaniel's "proffered ruling." Two days later, he sent his client, Malcomb, an August 5, 1976 letter stating that the custody case was concluded "tenuously" (and "custody is always subject to the further jurisdiction of the court") because he (Respondent) was highly surprised that the court awarded Malcomb custody of one child because of evidence of homosexuality and recent "gay" pornography photos and

APPENDIX—Continued

Malcomb "having been nude in the bathtub with this child." (However, *Judge MacDaniel* did not seem to view these matters as seriously as Respondent. The judge said, "There is nothing that the mother of this child proved against the father that in my opinion makes the father an unfit person. She brought out a homosexual situation that happened prior to the time of the marriage and some pictures that were looked at afterwards, but there is no concrete evidence of anything that developed into a problem with these children.") Respondent warned Malcomb the custody award of one child had to be "protected very carefully" and therefore his bill for "further proceedings" was for doing just this including the matter of child support. He said he did "not believe that $650.00 is an 'excess' [*sic*] charge for an attorney to make in seeking to avoid liability of his client for $13,000 payment" and then warned Malcomb not to write any "further neurotic letters to the judge unless you wish to endanger your award of custody."

Malcomb's contention was that in the June 8, 1976 custody hearing before Judge MacDaniel, Merle had raised fully the matter of homosexuality. He acknowledged such activity but testified it occurred before his marriage to Merle (in 1962). He denied recent "gay porno" photos stating he "apparently had gotten on a mailing list" and received several (postage stamp sized pictures) over a period of several weeks. As has been seen, it was *Respondent*—and not Judge MacDaniel—who viewed these matters so seriously. One wonders why Respondent made these threats upon his client and why Respondent felt so threatened.

The following matters are undisputed, namely, that Malcomb had already paid Respondent $1,000.00 plus $50.00 on the $650.00 bill but had refused to pay the remaining $600.00. Respondent then sent Malcomb on August 26, 1976 a bill for $1,850.00 listing a "previous balance" of $600.00 plus another $1,000.00 for "Additional final fee based on successful result." There was no conversation nor discussion between Malcomb and Respondent before Respondent sent the latter bill and Malcomb did not pay it. Respondent next sued Malcomb for $1,850.00 in the Towson District Court on October 4, 1976 asking for summary judgment. He filed an Affidavit that "there is justly due and owing by the defendant to the plaintiff the sum of $1,850.00" and attached the August 26, 1976 bill. Respondent then sent Malcomb another bill dated October 29, 1976 this time for $2,250.00. He listed $1,250.00 for "additional final fee based on successful result" and then added another $1,000.00 for "Re-analyzation of file, further additional fee based on time expended." At no time, did Respondent discuss the additional $1,000.00 with Malcomb nor did Respondent advise Malcomb of the basis for the $1,000.00. Malcomb did not pay. Respondent then sent Malcomb another bill dated February 11, 1977 this time for $2,850.00. It was a "Revised and Corrected Bill" which added $600.00 ("previous balance"). Malcomb did not pay. Five days later (February 16, 1977), Respondent filed an Amended Statement of Claim for $4,262.00 alleging an 'implied contract, to pay reasonable charges for legal services rendered, and such services were rendered according to the attached plaintiff's Statement of Claim Exhibit 1." This Exhibit consisted of five handwritten pages of alleged work plus the alleged time for the various alleged items of work (it also includes the previous billings) (*Although Respondent charged Malcomb for two trial "at $950.00 per day" it is undisputed that there was only one trial day*). Respondent then sent Malcomb a March 21, 1977 bill for $4,262.00 marked "*Corrected Bill*—Based on 'File Analysis' done in January, 1977." In April and May, 1977, Respondent sent "Balance Now Due" bills of $4,262.00 to Malcomb. Malcomb did not pay.

Respondent's contention was that the $1,000.00 paid by Malcomb was only a retainer and that when Malcomb was awarded custody of one child, Respondent sent him a bill for a "modest fee which was in keeping with my agreement with him, which was, that the prior payment was a retainer fee and that the total cumulative

APPENDIX—Continued

payment would be determined at a later date." As to the "Paid in Full" bill issued to Malcomb by his (Respondent's) bookkeeper, Respondent testified that she had "just about full independence;" that "he did not supervise the books;" that he had "difficulties about the wording, of the bills around the time" he was representing Malcomb; that he told her she must be careful. Thus he contended that she would use "Paid in Full" for her own "personal convenience" to refer to *any* bill with a flat fee or retainer. He contended that Malcomb initially wrote asking how much would Respondent require in the way of a retainer and he billed him first stating "Further Retainer" of $1,000.00

As to the various fee demands (from $650.00 to $4,262.00), Respondent claims that the $1,250.00 bill was based on the "successful result" of the Malcomb case; the $1,850.00 was Respondent's "total additional claim"; then "upon review of his file, however, Respondent realized that his initial billings did not reflect the value of the actual work performed. Having decided to sue on a *quantum meruit* basis, he revised the estimated value ... upward by $1,000.00;" the "third additional bill" was for a "reanalyzation of file, further additional based on time expended resulting in total additional claim of $2,250.00;" then, in preparation for the District Court trial (by then Respondent had sued Malcomb), Respondent estimated he had done 36.8 hours worth of work (exclusive of trial time) which he multiplied by $90.00 per hour and added his standard fee for two days ($950.00 per day) and arrived at his figure of $4,262.00. At that, Respondent feels he "undervalued" his services.

Respondent put on his wife who testified that Respondent had a lot of telephone conversations with his clients and she heard him invariably talk about retainers. It was his habit. (However, he sometimes charges "flat fees" in custody cases).

I find by clear and convincing evidence that Respondent agreed with Malcomb to represent Malcomb for $1,000.00 and no more and that the agreed $1,000.00 was not a retainer. The evidence is overwhelming. Respondent's own note to his own file "made at the time of the initial agreement by Respondent in December, 1975" states "Fee $1,000.00" and under that "retainer" and under that "$500.00 down" and under that "rest of it in a month or so." Although Respondent tries to minimize *his own note* (by terming it "unpunctuated" and by calling Bar Counsel's interpretation of it "subjective"), this note coincides with Malcomb's version entirely .... Moreover, when Respondent advised Malcomb of the date for trial, Respondent wanted the *balance* of his fee "($500.00 *balance*)" to be paid before the trial." He cannot blame *this* writing on his secretary because the request for the "$500.00 balance" was his own dictation with his own initials ("L.K."). Again this coincides exactly with the testimony of Malcomb. Respondent's February 18, 1976 bill to Malcomb indicates "Balance Now Due ... $500.00" and his March 18, 1976 bill also indicates "Prior Balance $500.00 Paid February 11, 1976 $50.00 Balance $450.00)."

Malcomb's testimony was straightforward and consistent whereas Respondent's was variously evasive, inconsistent and misleading. The escalation of fees by Respondent was incredible. He was quick to charge Malcomb an additional $650.00 fee two weeks after the June 8, 1976 hearing but—when Malcomb would not pay it, he increased his bill to $1,250.00; then $1,850.00; then $2,250.00; then $2,850.00 and finally $4,262.00.

His excuses were farcical. He sued Malcomb in District Court and filed an *Affidavit certifying* that $1,850.00 was *the* sum owed by Malcomb. Yet he later sent a higher bill for $2,250.00 claiming "reanalyzation of file." One would assume that when an experienced attorney of thirty years of practice sues his client for a fee that the attorney would at least know how to sue for the right amount. Respondent claims he did not sue too many of his clients so the normal thing for him to have done, would have been to analyze his file carefully before suit and then insert the proper

APPENDIX—Continued

amount. However, despite the fact that his previous affidavit certified that the sum for which he sued was "justly due and owing", he then further amended it up to $4,262.00.

When Respondent sued Malcomb for the $4,262.00, he purported to inform the court of the basis for that ($4,262.00) figure by attaching a File Analysis." This analysis listed, *inter alia*, "two trial days at $950.00 per day–$1,900.00." *However, at the District Court, when Respondent saw that Malcomb's attorney had produced the attorney (Hammond) who had opposed him (Respondent) at the trial in question (on June 8, 1976), as a potential witness, Respondent then admitted the trial took only one day.* (Malcomb testified that although Respondent listed a number of conferences, there was only one and Respondent's updated entries did not agree with his records and "I felt he was billing me ... for other work that he didn't do.") *Respondent's* testimony about his "work" is spotty and vague.

It is undisputed that Respondent never discussed any of his escalating bills with Malcomb beginning with the $650.00 bill. He simply sent them to Malcomb. As to Respondent's August 26, 1976 bill of $1,250.00 ("Additional final fee based on successful result,") if the July 20, 1976 conference (at 2:00 P.M.) with Judge MacDaniel left matters so up in the air as Respondent contended ("subject to all sorts of wavering winds of change ... open at that time, was the question of whether Malcom should pay support, it was still open to contest"), why would Respondent charge Malcomb an additional fee for "successful result?" According to Respondent, he felt that the July 20, 1976 decision reached by Judge MacDaniel (requiring Malcomb to pay $25.00 per week as support for Heather) was "unreasonable and unfair" and felt it would be "preferable to have a formal hearing." Obviously, in Respondent's mind, this could not be called a "successful result" under such unfair circumstances even if Malcomb did retain Kirsten (whom he had before Respondent came to represent him).

Respondent further attempted to justify the $650.00 fee which he said was not excessive when the arithmetic of it was considered (meaning Respondent's theory of a total dollar saving of $13,000.00 to Malcomb). However, this attitude was at best a naive and forlorn appeal to (by then) a totally disenchanted client and at worst a crude and dishonest effort to bulldoze Malcomb into submission. (The only way Malcomb could save $13,000.00 was to pay *nothing* for the support of Heather–something he never wanted to do.) He was perfectly content to pay this weekly sum for his child's support (as he *had been doing before he consulted Respondent*) as he told Respondent on a number of occasions. Respondent was aware of this. Despite Merle's earning *capacity* (she was *not* then employed) and marriage, it was decidedly unrealistic to expect any court to not require a father (earning near $22,000.00 per year–as per Malcomb's answer three to Merle's interrogatory–as prepared by *Respondent*) to pay *something* for the support of his child.

If the $1,250.00 bill was extortionate, the succeeding bills were even more so. There was no pretense at justification–simply a bald transmittal of ever–increasing dollar figures. No warning was given Malcomb; no conferences held; no attempt to itemize was made (except for the last bill in excess of $4,000.00–which contained a major "error"). There is no evidence from Respondent whatever as to guidelines or standards for future bills except Respondent's testimony that "the total cumulative payment be determined at a future date." Malcomb was totally at Respondent's mercy. Respondent's mercy can be brutal and ruthless.

Respondent tried to exploit the fact that Malcomb accommodated Merle when she "backdated" their separation agreement one month. This was mendacious conduct on Malcomb's part and Respondent excoriated Malcomb. However, by the same token, Respondent too knew that the March 29, 1974 agreement was based upon a fraudulent date and he too did the same thing as Malcomb–he kept quiet. His testimony concerning this inaction is evasive and un-

APPENDIX—Continued

convincing. Apart from this, I find Malcomb's testimony truthful and credible. I believe him when he denied receiving any January 16, 1976 bill ("Further Retainer"). While I did not find Draper's denial [in the matter of his complaint against Kerpelman] (that he had received Respondent's June 23, 1976 bill) sufficient to overcome the presumption that he did receive it, that finding was based on the fact that the denial was by way of discovery in California and Draper was not then present in Maryland to be viewed and questioned. In addition, there was some suggestion that Draper was under the influence of a drug, *compare U. S. v. Van Meerbeke*, 548 F.2d 415 (2d Cir. 1976) (defendant ingested opium in court–judge admonished for inaction). Here Malcomb was in court, he underwent a blistering and humiliating cross–examination by Respondent and maintained his composure and credibility.

I find by clear and convincing evidence that one of the prime motivations for Respondent's unwarranted, improper and unfair billing was anger. He testified before the Inquiry Panel that "I will show that client (Malcomb) who had filed this complaint against me, he can't get away with that and then I increased the *ad damnum*," he testified he didn't like Malcomb (he is "universally disliked"); and "probably that I was angry at him." Anger should not be the basis for charging a fee to a client (nor the basis for a lawsuit against a former client). (Respondent was also inconsistent as when he asserted that "fee disagreements" should be settled by "impartial referees" and yet turns around and sues both Malcomb and Draper without any attempt at arbitration.)

In numerous respects, Respondent testified in an inconsistent and inaccurate manner. He called the Malcomb case a "junk case" but then realizing the danger of alluding to a custody case involving young children that way (to say nothing of charging $1,000.00 for a "junk case"), he quickly denied it was a junk case; he testified that one of the children testified as to the so–called nude bathing incident in court but this was not so and, in fact, the children were not even in court; he told *Malcomb* the decision of Judge MacDaniel was "entirely unreasonable and unfair" and suggested there should be a *formal hearing* as to child support but he told *Judge MacDaniel* that his decision (the judge's) was "entirely correct ... aside from the support question which is, however, a relatively minor matter in the overall case, and, of course, a matter to which gentlemen may honestly differ; he told Judge MacDaniel (by letter dated July 30, 1976) that the reason for his "slight delay" (in not sending Judge MacDaniel the proposed order) was "in order to have (Malcomb's) decision in writing, I was taking the time to transmit to him and receive back the communications indicating he agreed with the support provision" whereas his letter to Malcomb asking for the written confirmation is dated *later* on August 3, 1976; and asserted that he had "purposely refrained from claiming that privilege (Fifth Amendment) ... in his deposition" when he *did* so claim it as to his deposition ("I received a notice of deposition ... and on the basis of *Spevack v. Klein* ... I refused to be sworn ... on the basis of the Fifth Amendment.").

Conclusions of Law

1–102(A)(4)

A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

I find the following by clear and convincing evidence: that Respondent represented to Malcomb that his total fee for his representation in the custody case would be $1,000.00 and no more but that in violation of his agreement, he charged (or attempted to charge) Malcomb fees over the agreed upon amount; that Respondent made a wilful misrepresentation to Malcomb as to his (Respondent's) fee; that Respondent maliciously and improperly escalated fee charges to Malcomb without any basis, without any agreement, without any warning and without the escalated charges bearing any relationship to the amount of work done. Thus he has violated the above Disciplinary Rule.

APPENDIX—Continued

As to Respondent's doing nothing to either advise Malcomb or the court of Malcomb's knowing acquiescence in Merle's backdating of their separation agreement, I am not convinced by clear and convincing evidence that Respondent furthered a fraud on the court.

1-102(A)(5)

A lawyer shall not engage in conduct that is prejudicial to the administration of justice.

I find by clear and convincing evidence that Respondent did improperly and consciously attempt to obtain legal fees from Malcomb; and did utilize the court system to knowingly and improperly attempt to obtain legal fees from Malcomb. Therefore, he has violated the above Disciplinary Rule since such condition is clearly prejudicial to the administration of justice. Respondent's conduct is inimical to justice.

1-102(A)(6)

A lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law.

I find by clear and convincing evidence that Respondent violated the above Disciplinary Rule by improperly attempting to obtain legal fees from Malcomb and by utilizing the court system knowingly and improperly to obtain unwarranted legal fees from Malcomb.

1-102(A)(1)

A lawyer shall not violate a Disciplinary Rule.

Because I have found by clear and convincing evidence that Respondent has violated above first three Disciplinary Rules, I find by clear and convincing evidence that Respondent has violated Disciplinary Rule 1-102(A)(1).

Issue Two: Did Respondent violate any Disciplinary Rules by misrepresenting to Malcomb that his case was not yet resolved in the judge's mind (and could not have been) until the August 9, 1976 decree was signed and that he (Respondent) was working on the case (from July 20, 1976 on) when in fact, the judge's ruling was made July 20, 1976, and the only matter remaining was the drafting and approval of the court-directed order; and Respondent was not working on Malcomb's case but rather trying to give the appearance of work in order to exact improper fees from Malcomb?

Findings of Fact

The facts as found in Issue One ... are also found as to this Issue.

Judge MacDaniel testified that he did "recall the case" and that the hearing date (as reflected from the file) was June 8, 1976. "Hearing and testimony was taken." He made a decision "when the case was over, that day." (June 8, 1976). The decision was "in accordance with the Decree that ended up being signed" (the August 9, 1976 decree awarding Heather to Merle; Kirsten to Malcomb; and requiring Malcomb to pay $25.00 per week as child support for Heather). He was requested by one of the attorneys to wait a period of time and allow the attorneys to come back and argue "or further discuss the case with me and I believe we even set a firm date ... for them to come back. Whatever date that was I believe they did come in and I told them that, what my decision was, and told Mr. Hammond, I believe, to prepare a Decree, submit it to Mr. Kerpelman for approval as to form and then to the court and that I would sign it." He testified it was on July 20, 1976 and it was not a hearing but "just a kind of argument." He testified that he did receive a call from Malcomb and at first, refused to talk to him until he was "informed that he (Malcomb) only wanted to know when I was going to make up my mind and I then did talk to him ... and I told him that I had made it up and ... I was only waiting for the attorneys to send in the Decree so I could sign it." The judge testified that the reason he talked to Malcomb was "... his comment was that I hadn't made a decision and I felt if I told him the decision had been made, that maybe he would go to his attorney or the other one and get the Decree into me so I could sign it."

APPENDIX—Continued

He had no recollection at all as to the matter of support in the July 20, 1976 conference.. He testified that between July 20, 1976 and the time he received the Order to be signed, he "had no contacts with Respondent that he knew of."

Hammond testified that at the half hour conference on July 20, 1976, Respondent was upset at Judge MacDaniel's indication that he was going to award child support for Heather; that Judge MacDaniel asked me "to prepare an order commensurate with his decision;" that he did so and sent the proposed order to Respondent on July 22, 1976 for consent as to form ("if there are any questions, please so advise"); that Judge MacDaniel was firm in his July 20, 1976 position (Heather to Merle; Kirsten to Malcomb; $25.00 child support for Heather) and "that was his decision whether Mr. Malcomb agreed to it or whether he didn't, that was his decision;" that Respondent sent him a "temporary order" on July 1, 1976 which he (Hammond) refused to accept; and that from July 20, 1976 on (to the District Court case November 4, 1977), he had no other conversations with Respondent with regard to the case.

It is Malcomb's contention that the judge had clearly made a decision on July 20, 1976, and that Respondent knew it but tried to convince Malcomb that the matter was still unresolved. He and his wife Kathleen testified that they met Respondent at a FUER meeting on July 27, 1976 and Respondent told him he "was still working on the case" and that it was not settled. Nothing is ever settled. It is still up in the air. It is touch and go. I have been meeting with the judge and trying to get worked up. You know, judges are very reluctant to divide custody of children." It was also Malcomb's contention that divided custody was very much what he (Malcomb) wanted; that he was perfectly content to pay weekly child support of $25.00 for Heather; and that he had told this to Respondent repeatedly. Malcomb contended that when he discovered Respondent's brazen attempt to string him along he terminated his relationship with Respondent.

It is Respondent's contention that the order was not effective until it was signed; that despite Malcomb's willingness to pay child support, he was trying to convince him (Malcomb) not to accept the prepared order as to child support because of Merle's earning capacity and her marriage; that there was no such July 27, 1976 conversation with Malcomb at the FUER meeting; that despite Malcomb's having custody of Kirsten, this was not secure (because of Malcomb's past homosexuality); that he promptly informed Malcomb of the outcome of the July 20, 1976 hearing and that Malcomb considered the option (of contesting the award of support) for at least a week.

I find by clear and convincing evidence that Respondent deliberately withheld from Malcomb the decision of Judge MacDaniel on July 20, 1976; that he only submitted the proposed order to Judge MacDaniel on July 30, 1976 when he realized that Malcomb had found out about Judge MacDaniel's decision reached on July 20, 1976; and that he deliberately withheld the judge's decision in order to make it appear to Malcomb that he (Respondent) was still working on Malcomb's case in order to justify his "further" (and improper) fee.

Again, the evidence is overwhelming. I find as fact the following undisputed chronology of events:

1. **June 8, 1976**–It is undisputed that there was a hearing on this date; and that the judge stated at the end that the attorneys should let the situation remain status quo (Heather to stay with Merle; Kirsten to stay with Malcomb); that the attorneys should return in two weeks and at that time, he would make a determination· that Malcomb should pay child support for Heather; and *that he had made his decision (Heather to Merle; Kirsten to Malcomb and Malcomb to pay $25.00* per week child support for Heatner) on June 8, 1976 ....

2. **June 23, 1976**–Respondent bills Malcomb $650.00 for "Further retainer."

3. **July 1, 1976**–Respondent sends proposed Temporary Order to Hammond (Heather to temporarily remain in custody of Merle; Kirsten to temporarily remain in

APPENDIX—Continued

custody of Malcomb; support shall continue with payments to be made as heretofore). (Malcomb *had* been paying $25.00 per week for Heather's support).

4. July 20, 1976–Conference between Respondent, Hammond and Judge MacDaniel. The judge reaffirmed his previously reached decision and directed Hammond to prepare an order accordingly. He was firm despite Respondent's being upset about Malcomb being required to pay child support for Heather ....

5. July 22, 1976 (Thursday)–Hammond sent proposed order to Respondent and Respondent "probably" received it on July 23, 1976.

6. July 22, 1976–Malcomb called Merle and Hammond ... and ascertained that he (Malcomb) was to have custody of Kirsten and pay $25.00 child support for Heather; and Merle was to have custody of Heather.

7. July 27, 1976–Respondent tells Malcomb the case is still not settled; it is still up in the air; judges don't like divided custody ... (while this matter *is* disputed, I find as a fact that it occurred).

8. July 28, 1976–Malcomb called Judge MacDaniel and ascertained same thing and also that the judge had made his decision on July 20, 1976.

9. July 28, 1976–Malcomb confronted Respondent with the above by telephone.

10. July 28, 1976–Respondent wrote Hammond he'll return the order as soon as he has had the opportunity to go over one or two matters with Malcomb.

11. July 29, 1976–Malcomb sent letter of termination to Respondent as result of Respondent's "brazen attempt to string me along *after* Judge MacDaniel had made his decision on July 20th."

12. July 30, 1976–Respondent sent proposed order to Judge MacDaniel (and signed it).

13. August 3, 1976–Respondent sent letter asking Malcomb to confirm in writing his consent to the child support requirement.

14. August 5, 1976–Respondent wrote Malcomb that the custody case is concluded "tenuously."

15. August 9, 1976–Judge MacDaniel signed order.

Malcomb's version is entirely credible; Respondent's is not. It is that simple. If Respondent promptly informed Malcomb of the outcome of the July 20, 1976 hearing, as Respondent says, then why would Malcomb call Merle? Or Hammond? Or Judge MacDaniel? Respondent offers no corroboration as to *his* "promptly" informing Malcomb whereas *Judge MacDaniel* testified that Malcomb *did* phone him and what is more, his (Judge MacDaniel's) version of the conversation is exactly the same as Malcomb's. Aside from corroboration, why would Malcomb *want* to call these people if Respondent had really told him about the proposed order. The decision was exactly what Malcomb wanted!

As to Merle having custody of Heather and Malcomb having custody of Kirsten, Respondent *knew* that was what Malcomb wanted. In fact, *Respondent* had written on January 7, 1976, *suggesting divided custody on behalf of Malcomb.* As to supporting Heather, Malcomb *had* been paying the weekly sum of $25.00 for Heather's support even *before* he consulted Respondent and he *told* Respondent he was quite content to continue to do so (his income was as follows: 1971–$16,003.30; 1972–$15,224.03; 1973–$21,052.41 and 1974–$21,707.43).

Respondent admits he *probably* received the proposed order from Hammond on July 23, 1976. So he had it in his possession from July 23, 1976 to July 30, 1976 (when he mailed the *agreed upon* order to Judge MacDaniel). Even before he received the proposed order from Hammond, he knew Judge MacDaniel's decision (having been informed of it at the July 20, 1976 conference). If he promptly advised Malcomb of that decision and if, as has been seen, the decision was precisely what Malcomb wanted, why would Malcomb write a letter of outrage to Respondent? Although Respondent claims Malcomb was trying to avoid paying the $650.00 fee, I find conclusively

APPENDIX—Continued

that Malcomb was genuinely outraged and did not desire to bilk Respondent out of his fee. Malcomb had paid the $1,000.00 fee set by Respondent in accordance with Respondent's direction but when Respondent sent a bill contrary to their agreement, Malcomb balked and understandably so.

More to the point is that the actual decision was reached not on July 20, 1976 but on June 8, 1976. Judge MacDaniel testified that he *reached* the decision on June 8, 1976, repeated it on July 20, 1976 and ultimately signed an order embodying the same decision on August 9, 1976. While Respondent attempts to avoid the implications of this basic fact by a legal argument (that the decision did not become final until signed), that is beside the point. From a fact finding viewpoint, Malcomb's actions make sense, are consistent and are credible.

Respondent claims he not only promptly advised Malcomb to contest the oncoming child support order but requested that Malcomb consider this "option for at least a week before taking any action." But as seen before, why should Malcomb contest something that he favored? More interesting is the fact that Respondent had to explain why he kept the proposed order received by him for this one week (from July 23, 1976 to July 30, 1976). Respondent had to explain away that week. Respondent's claim that Malcomb was pondering and considering the simple matter of whether or not to support his child is simply not credible.

I find Malcomb's behavior consistent. Respondent's behavior, however, is not. If, as Respondent contended, he truly felt that Judge MacDaniel's proposed order was so "unreasonable and unfair," how does he explain the fact that from June 8, 1976 to August 9, 1976, he did absolutely nothing about it? He wrote no letters to Judge MacDaniel (nor to Hammond); he filed no motions and asked for no hearings. There was absolutely no *conduct* on his part to evidence such displeasure with the support phase of the upcoming order. On the contrary, he wrote Judge MacDaniel calling the support question "a relatively minor matter in the overall case" and that gentlemen could differ. Even *before* the July 20, 1976 conference, the objective conduct of Respondent is consistent only with *acquiescence* in the support situation. Malcomb *had* been paying $25.00 per week for Heather's support, and on July 1, 1976, Respondent sent to Hammond a proposed temporary order (*prepared by Respondent*) proposing child support "as heretofore." Respondent tries to avoid the implications of his action by asserting a difference between temporary and permanent child support. Here again, this is beside the point. The question is what is the totality of the factual situation to a factfinder.

Respondent sent a $650.00 bill for "further retainer" on June 23, 1976. The word "retainer" is significant. If future work really had to be done, then the $650.00 bill would be justified at least in the sense of a fair bargain (work for money). But if there was no work to be done, then the bill would be totally unjustified. I find that there remained no substantial work to be done after July 20, 1976 and if there were, none was ever performed by Respondent. I find further (all by clear and convincing evidence) that Respondent deliberately intended to give Malcomb the impression that he (Respondent) was obliged to perform work on Malcomb's case when, in actuality, there was no work to be performed.

Conclusions of Law

1-102(A)(4)

A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

I conclude by clear and convincing evidence that Respondent deliberately misrepresented to Malcomb that there remained work to be done on his (Malcomb's) case and that he (Respondent) was actually engaged in performing such work, whereas, after July 20, 1976, there remained no work to be done and Respondent, in fact, performed no work and that this misrepresentation was made to justify an improper fee. I therefore find that he violated the above Disciplinary Rule.

APPENDIX—Continued
1-102(A)(6)

A lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law.

I conclude by clear and convincing evidence that the aforesaid deliberate misrepresentations by Respondent constitute clear conduct that adversely reflects on his fitness to practice law. In addition, Respondent deliberately misrepresented to Judge MacDaniel in his July 30, 1976 letter that his delay in transmitting the proposed order was caused by his desire to have Malcomb's written agreement as to the child support provision (and to have Malcomb have enough time to be certain) whereas in fact Malcomb had not communicated his written agreement at the time Respondent sent the July 30, 1976 letter (nor after); and there was no need for Malcomb to so agree in writing since at all times Malcomb *had* agreed and Respondent knew it.

Issue Three: Did Respondent violate DR 2-110(a)(2) by improperly withholding Malcomb's papers and the decree after being discharged by Malcomb; and by continuing to deal with Judge MacDaniel after he was discharged?

I find no clear and convincing evidence that Respondent violated this Disciplinary Rule.

Issue Four: Did Respondent violate DR 6-101(A)(2) by lack of adequate preparation in that he conducted no discovery, interviewed no witnesses before trial, called witnesses who were of little or no probative value, failed to call witnesses who were of probative value and generally displayed no knowledge of the facts surrounding the Malcomb case?

The facts as found in Issues One and Two . . . are also found as to this Issue.

Bar Counsel asserts that Malcomb "wanted" both children-meaning custody of both. I do not agree. While Malcomb may have wanted custody of both at an earlier time, his final and steady decision was to obtain custody of Kirsten alone allowing Merle to have custody of Heather.

Findings of Fact

The trial in question took place on June 8, 1976. It arose as the result of Merle's filing of a petition to modify the March 29, 1974 decree (which granted custody of both children to Malcomb). Malcomb's then attorney (Bartholomee) filed Malcomb's answer to said petition and also filed written interrogatories upon Merle. She filed her answer and also filed written interrogatories upon Malcomb. By this time, Respondent had replaced Bartholomee. Respondent filed a petition for "Immediate Return of Child" (Heather) and obtained a Show Cause Order (December 17, 1975). He also filed answers to Merle's interrogatories. (December 23, 1975). Respondent then issued a summons for witnesses (Malcomb's wife, Kathleen, Dr. Jane Mason, Sarah Fischer and Janet Slutter) together with subpoena *duces tecum* for Drs. G. P. Patton, Jane W. Mason, Harvey L. Saxton and Santiago Garza.

The trial took one day. Merle produced five witnesses and Respondent produced five also (including Merle as an adverse party). While Respondent filed no interrogatories, his predecessor (Bartholomee) did. Merle's answers provided the names of certain witnesses but Respondent never deposed nor interviewed them (except that he did summon Dr. Jane Mason, one of the witnesses listed in Merle's answers to interrogatories).

Prior to trial, Respondent did have one "formal interview " with Malcomb but he never interviewed any of Malcomb's witnesses until the day of the trial. Nor did he depose anyone. This subjected him (Respondent) and his client to the same type of infirmities as mentioned previously ....

Respondent did hire one Mary Slicher (private social worker) to investigate. Bar Counsel feels that Respondent failed to note the contents of her report as concerns Mr. and Mrs. Grabus which, Bar Counsel feels, adversely affected Malcomb. Yet paradoxically Bar Counsel downplays Ms. Slicher noting that Judge MacDaniel did not allow her to testify as an expert ("not to her experience but just observations") nor "was her report admitted into evidence."

APPENDIX—Continued

What Bar Counsel perceives as inadequacy may well be trial tactics. For this reason and for the reasons outlined [previously], I do not find that Respondent violated DR 6-101(A)(2).

FILED
Atty. Griev. Comm. of Md.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND	:	IN THE
Petitioner	:	COURT OF APPEALS OF MARYLAND
v.	:	Misc. Dkt.
LEONARD JULES KERPELMAN	:	(Sub-title BV) - No.
Respondent	:	Sept. Term 1979

-oOo-

STATEMENT OF PROCEDURE, FINDINGS OF FACT AND CONCLUSIONS OF LAW

On March 20, 1979, the Attorney Grievance Commission of Maryland (AGC)[1] through Bar Counsel[2] filed a petition for disciplinary action against Respondent in the Court of Appeals pursuant to Rule BV9[3] of the Maryland Rules of Procedure (MRs). He asserted that the Review Board[4] had directed him to file charges[5] that Respondent engaged in misconduct[6] in connection with his representation of three former clients: David W. Draper (Draper), John D. Malcomb (Malcomb) and Everett G. Jarvis (Jarvis). [The Jarvis charges were later withdrawn][7]. He asked the Court of Appeals to take such disciplinary and other action as it "may deem appropriate." By Order dated March 23, 1979, the Court of Appeals responded to Bar Counsel's allegations that Respondent did unethically and unprofessionally violate certain provisions of the Disciplinary Rules (DR) of the Code of Professional Responsibility (CPR) and transmitted the charges to the Supreme Bench of Baltimore City (Eighth Judicial Circuit) to be heard and determined by the undersigned.[8] Throughout the proceedings, Bar Counsel was represented by J. Martin McDonough, Jr. Esq. (McDonough) and Henry J. Myerberg, Esq. (Myerberg). The Respondent represented himself. He was told of his right to

counsel and his right to not be represented.T. April 15, 1979 at 2.

PLEADINGS

Respondent, who was served personally with the Petition on March 27, 1979,[9] filed various pleadings thereafter:

1. Motions For Protective Order

On March 30, 1979, he filed a Motion for Proctive (sic) Order to prohibit the taking of his deposition,[10] prohibit the AGC from conducting further "discovery"(without further leave of court and without good cause shown)[11] or to require him to answer Interrogatories without good cause shown.[12] He asserted that there was full testimony before the Inquiry Panel, that the taking of his deposition would inconvenience or prejudice his clients and set back important trial matters, that the purpose was to harass him and that he had "not yet obtained counsel" (as a matter of fact, he never did obtain counsel even though he was advised by the court of his right to counsel many times).[13] [On March 30, 1979, he filed another Motion for Protective Order seeking the same relief,[14] alleging that the case was not yet at issue.[15] As to both motions, he asked for hearings.] On April 5, 1979,[16] Bar Counsel answered Respondent's two Motions and moved to strike them[17] (Bar Counsel's Motions were denied. T. April 5, 1979 at 11-13).

After a full hearing,[18] Respondent was ordered to answer "or otherwise respond"[19] to Bar Counsel's Interrogatories. His response was that he refused to answer them because they exceeded thirty.[20] After full hearing on this issue,[21] Respondent

was ordered to file answers to the Interrogatories[22] (except for Interrogatories 3 and 6 to which Respondent's exceptions were sustained.[23] (Respondent thereafter refused to answer certain Interrogatories so Bar Counsel filed exceptions. After a full hearing,[24] certain of Bar Counsel's exceptions were sustained and certain were overruled).[25]

Also after a full hearing,[26] his motion not to have his deposition taken was denied. On the morning of the deposition, Respondent refused to be sworn on the basis of the "Fifth Amendment" (citing Spevack v. Klein" 87 Supreme Court, 625") whereupon both Respondent and McDonough came to this court's chambers at 9:50 A.M. on April 18, 1979. This court, citing MSBA v. Sugarman, 273 Md. 306 (1974), ruled that Respondent had a right to assert the Fifth Amendment [T. April 18, 1979 at 15] but that he should be sworn, questions should be put and "he will assert the privilege if and when he wishes" [id at 19] - see id generally).

2. Motion For Transfer

On April 10, 1979, Respondent moved the Court of Appeals to have his case transferred from Baltimore City to another judicial circuit.[27] The Court of Appeals, by Order dated April 20, 1979,[28] denied said Motion.

3. Election For Jury Trial

On April 10, 1979,[29] Respondent elected a jury trial. After a full hearing,[30] this election was denied on May 2, 1979. (MR-BV 10d states that hearing of charges is governed by the same rules of law and procedure as are applicable to the trial of civil proceedings in equity. MR517 provides that fact issues

shall be determined in equity without a jury, cf. Village Books v. St. Atty., 263 Md. 76, 94 (1971). While there appears to be no Maryland case, the law does not guarantee a jury trial in disciplinary cases. State v. O'Bryan, 385 P. 2d 876,895-96 (Okl. 1963), app. dism. and cert. denied, 376 U.S. 649 (1964); and see generally 50C.J.S. Juries, Sec. 66.

4. Demurrer

On April 10, 1979, Respondent demurred[31] to Bar Counsel's petition.[32] After a full hearing,[33] the demurrer was overruled.

5. Motion For Severance

On April 10, 1979, Respondent moved for severance.[34] After full hearing,[35] this motion was denied.[36]

6. Motions Raising Preliminary Objections
(Bias and prejudice by Attorney Grievance Commission Inquiry Panel, Review Board, Maryland State Bar Association, and Baltimore City Bar Association)

On April 10, 1979, Respondent filed thirty-one Motions "Raising Preliminary Objections."[37] He alleged a denial of due process because of religious prejudice by the entire staff of Bar Counsel ("Not one...was of Respondent's religion");[38] because the Inquiry Panels were set up by bar association officials acting with religious prejudice and those of his religion were underrepresented; that the Review Board "appeared" to contain only two persons of Respondent's religion out of fifteen and was "packed"; that the Inquiry Panel and Review Board were not representative of individual practitioners (Respondent said he was such) or criminal defendants or plaintiff's attorneys but rather large law firms; that Inquiry Panel and Review Board members were selected exclusively from Maryland State Bar Association and County Bar Associations and not from other Bar Associations (such as the Monumental Bar Association; hence, he argued their philosophy differed from his and they were not representative); that the Inquiry Panel refused to adduce evidence of

prejudice, that the Review Board did not give him a copy of the transcript; that the Review Board denied oral argument; that the AGC was biased against Blacks and Jews and was slanted towards large law firms, insurance and bank companies; the Review Board was hasty and did not allow Respondent to remove "certain stated enemies" of his; that the Review Board's Report did not spell his name correctly; that the Review Board did not have one of the transcripts available at the time of its decision; that the Inquiry Panel and Review Board acted on the basis of uncorroborated testimony of displeased clients alone; that the AGC refused to consider his charges of its bias; that the AGC dismissed serious claims against lawyers who were not Black, Jewish, small firm or individual practitioners; that the AGC was financed by an illegally imposed tax;[39] that the charges were different from those heard before the Inquiry Panel and Review Board and included charges added by the Review Board after such charges had been dismissed by the Inquiry Panel;[40] that the "Chief Judge of the Court of Appeals, Murphy" participated without disqualifying himself "in certain proceedings" including selection of a judge to try "this matter" and the said Chief Judge has personal animosity towards him; that unknown members of the Inquiry Panels and Review Boards have been established by volunteers; that Bar Counsel failed to transmit the transcript of testimony to him (and the Chairman of the Review Board failed to tell the entire Review Board of Respondent's objection in this respect).

Respondent thus asserted a "lack of due process" which resulted in a lack of jurisdiction over his person and over the subject matter of the case; insufficiency and illegality

of process; and a lack of legal capacity of Bar Counsel to sue him. A couple of months later, he filed an "Ammended (sic) Motion Raising Preliminary Objection" claiming that different standards were exercised as to him "than to others" and he was denied equal protection of the laws.[41]

A month later,[42] Respondent filed another "Motion Raising Preliminary Objection" claiming that he was charged with an "infamous quasi crime" and hence the "Klein case"[43] was authority that he could not be charged except on indictment of a Grand Jury.

Respondent then filed the following request for Subpoenae Duces Tecum on May 7, 1979:

a. To George D. Solter, Chairman, Attorney Grievance Commission (Solter) to produce

1. Voluminous employment and personal records of the AGC, Bar Counsel and its staff (and personnel) dealing with race, age, national origin, color and religion; ("and every such detail") its budgets for years 1976 through 1979.
2. Records pertaining "to the setting up and employment of the Pittman staff, including attorneys, clerks, janitors, sweepers, administrators and personnel of every sort" including application forms and personnel files.
3. Records of the AGC re to terms of membership of all "inquiry committees and Review Board committees" and chairmen and vice-chairmen.

b. To James A. Frost (Frost) to produce certain numbered complaints made to the AGC.

c. To L. Hollingsworth Pittman (Pittman) to produce certain numbered complaints.

d. To Vincent L. Gingerich, President, Maryland State Bar Association (Gingerich) to produce records of attorneys who applied for or were selected by the Board of Governors of the Maryland State Bar Association to be members of the Review Board showing ages, race, sex, ethnic background and religion.

e. To Robert E. Ashman, Executive Director, Bar Association of Baltimore City (Ashman) to produce records re selection of members of "Inquiry Committee" or Inquiry Panel showing, inter alia, age, sex, race and religion" and any other background material" and appropriate charter by by law re guidelines in selecting.

f. To Theodore S. Miller, President, Bar Association of Baltimore City (Miller) to produce the same records requested of Ashman.

On May 7, 1979, he also filed requests for witness summons for the following:

1. Solter
2. Ronald W. Parker (Parker)
3. H. Earl Weagley (Weagley)
4. Frost
5. Paul N. Niemeyer (Niemeyer)
6. Francis S. Brocato (Brocato)
7. Louis G. Close (Close)
8. Pittman
9. I. John Ritterpusch (Ritterpusch)

10. Milton R. Smith, Jr. (Smith)

11. Hamilton R. Fox, Jr. (Fox)

12. Ernest M. Thompson (Thompson)

13. Ann McK. Turnbull (Turnbull)

14. George A. Brugger (Brugger)

15. David A. McNamee (McNamee)

16. Daniel W. Moylan, Esquire (sic) (Moylan)

17. F. Duncan Cornell (Cornell)

18. Ronald M. Naditch (Naditch)

19. Charles A. Reese (Reese)

20. Ralph E. Deitz (Deitz)

21. Herbert L. Belgrad (Belgrad)

22. Henry L. Rocklin (Rocklin)

23. Honorable James A. Perrott (Perrott)

The request for summonses and subpoenae duces tecum was ostensibly to support Respondent's aforesaid "Motions" at an evidentiary hearing Respondent requested. On May 2, 1979, the AGC moved to strike these Motions (or not receive them) or in the alternative, to answer them;[44] Pittman moved to "quash subpoena Duces Tecum and/or for Protective Order";[45] the AGC moved for Protective Order with regard to the summonses and subpoena Duces Tecum;[45A] Frost moved to quash the process as to him;[46] and the AGC moved to quash the process issued to Solter[47] and it.[48] After full hearing, this court quashed the process dealing with budget of "the Pittman staff" and Ashman (Respondent agreeing but denied that his testimony would be duplicative) but denied Bar Counsel's other Motions.[49]

Thus, after full argument,[50] this court ruled in Respondent's favor to permit him to offer evidence in support of his thirty-one (now thirty-two) Motions. However, this court also stated that while Respondent should have full opportunity to prove his accusations, this was not to be equated with a favorable ruling on his Motions.[51] This court's reservation was based upon AGC v. McBurney, 282 Md. 116 (1978) which analogized disciplinary procedure with a Grand Jury presentment and Bartram v. State, 280 Md. 616, 628 (1977) which illustrated that criminal charges were not to be dismissed even when Grand Jury presentments emanated from grand jurors who were seemingly prejudiced.[52] As a matter of fact, this court's reservation was fortified by the case of AGC v. Stewart, 285 Md. 251 (1979) which was published on the last day of voluminous hearings on Respondent's thirty-two Motions.[53] Stewart held that a lawyer charged with misconduct is not entitled, at any stage of disciplinary proceedings, to all of the consti/tutional safeguards accorded an accused in a criminal proceeding. "Such a lawyer is entitled to the basic elements of due process -- notice and an opportunity to defend in a full and fair hearing." Id at 259 . Therefore, contentions of denial of due process in Inquiry Panel and Review Board proceedings were held to be without merit in Stewart.

Stewart would seem to be dispositive of Respondent's similar contentions. However, even if it were not, Respondent in no way proved his contentions. He charged, for instance, that all Inquiry Panels were set up by bar association officials acting with religious prejudice and yet his "proof" showed just the opposite.

He produced Theodore S. Miller, the President (and formerly Vice President) of the Bar Association of Baltimore City (Miller) who testified that pursuant to MR-BV5, he actively participated in selection of members of an "inquiry committee or Inquiry Panel" (T. May 29, 1979 at 138); that the local Bar Association makes recommendations to the AGC as to who should serve on the Inquiry Panel (id. at 140) and that there were forty recommended names by the Baltimore City Bar Association (id. at 143). He remembered "very distinctly" the process of selection (which had existed for years -- including the year in which Respondent appeared before such Inquiry Panel) (id. at 144) and described it as follows: the officers of the Baltimore City Bar Association met (one other/of whom was of the same religion as Respondent -- Nathan Patz, Esq., id. at 145 and 147) to have a "broad based, diversified group of attorneys" (id. at 147) "who came from various backgrounds and that was a deliberate and calculated attitude by our attorneys to insure that all segments of the Bar were represented and that has always been the procedure" (id. at 147-148). At Respondent's insistence (to show a "practice" --id. at 152). Miller pointed out that the list contained solo practitioners (id. at 154-159), some small firm practitioners (including Stanley Sollins "who I know resigned to become Chairman of the Baltimore Jewish Council -- id at 153) as well as attorneys from "large" firms. Many of the other attorneys were of Respondent's religion (Edward L. Putzel, Esq., Abraham L. Adler, Esq., Paul Weinstein, Esq., Jacob Matz, Esq., id. at 155-156). Miller, who himself is of the same religion as Respondent (id. at 164 and 597)

testified that the following procedure had existed for years.

> "We really, painstakingly attempted to make sure that there was a representative, across the board group and that we submitted."
> T. May 29, 1979 at 161
>
> "...we attempted to have some women on the names we submitted, some blacks, there was no percentage or anything of that sort. It wasn't trying to have 5% women and 5% blacks, and 20% jewish or anything of that sort...what we did try to do was to see to it that it was a balanced, across the board kind of representation. We were concerned, or at least I was, in particular, that there would be small office lawyers."
> T. May 29, 1979 at 162
>
> "I consciously injected into it the fact that there ought to be jewish representation both from large offices and small offices."
> T. May 29, 1979 at 164

Respondent produced Ginnerich who testified that when a vacancy existed on the Review Board, the Board of Governors (of the Maryland State Bar Association) was requested to make recommendations of well-qualified persons (T. May 29, 1979 at 39) and the Board of Governors contained attorneys from "very small firms or solo practitioners" as well as from "large law firms" (id. at 42).[54]

Respondent produced Solter, Chairman of the AGC, who testified as to the composition of the AGC as follows:

1. "Beckett" - in a firm of over two (id. at 47)
2. Walter Black - in a firm of ten or twelve (id. at 50)
3. "Mr. Cromwell"
4. Mr. France - in a firm of under ten (id. at 50, 51)
5. R. Taylor McLean - in a Towson firm (id. at 51)
6. "Mr. Smithhurst" - in a firm of less than ten (id. at 51)
7. Mr. Walsh -

He produced (or summoned) the following Inquiry Panel and Review Board witnesses:

1. Herbert J. Belgrad - Jewish (T. June 1, 1979 at 19) - in a firm of thirteen attorneys (id. at 19). Mr. Belgrad was Vice Chairman of the Inquiry Panel

for three years and a member of the Review Board for one year (id at 19).

2. Francis S. Brocato - Solo practitioner (T. May 29, 1979 at 220) Member Inquiry Panel (at time he heard Respondent's matters, he was in a two man firm).

3. Louis Close, Jr. - Inquiry Panel (id at 210)

4. Ralph E. Deitz - Review Board (id at 113)

54A

5. Hamilton Fox - Review Board (T. May 28, 1979 at 97); solo practitioner (id at 110); in response to Respondent's question was he prejudiced "against anybody" (id at 114), he replied:

> "A. Well, I hope not. Certainly not against jewish/people (sic). I have a jewish daughter-in-law...
>
> Q. You were aware in your mind, that I am jewish. Is that correct?...
>
> A. Because you made me aware of it by your allegations in this case... I don't know that I was aware you were jewish before that..." (id at 115-116).

6. Daniel W. Moylan - Review Board (T. May 28, 1979 at 64); in a four person law firm (id at 65), christian religion; not aware of Respondent's religion at the time Respondent's matter was before the Review Board (id at 82); "I felt consciously able to identify with a practitioner from a small firm or solo practitioner very

well, because I was a member of a small firm" (id at 84).

7. Paul Niemeyer - Chairman Inquiry Panel (T. May 29, 1979 at 201); Piper and Marbury - total lawyers "in the eightyish range" (id at 201).

8. I. John Ritterpusch - In a four lawyer firm; Chairman of the Inquiry Committee (id at 118).

9. Ernest M. Thompson - Review Board; when so selected was a member of a three lawyer law firm, one of whom was his wife (T. May 28, 1979 at 121).

Based on Stewart and based on lack of proof and based on irrelevance and/or immateriality (even if there were proof), the due process attack fails. It must be remembered that it is not necessary that every Inquiry Panel and every Review Board be representative of all economic, social, religious, racial and political groups of the legal community. What is necessary is a method reasonably designed to produce a representative cross section without any systematic and intentional exclusion of any group. Compare Wilkins v. State, 16 Md. App. 587 (1973). [jury selection]. And see Earp, Fair Representation vs. Systematic Exclusion, Law Forum, Univ. of Balto., Spr., 1979, Vol. IX, No. 2

Likewise, the equal protection attack (that the AGC failed to discipline "silk-stocking" establishment attorneys) must fail also based on the persuasive analogy of the cases cited at the June 1, 1979 hearing. [Drews v. State, 236 Md. 349, 354 (1964) (contention "that the failure of the State to prosecute others for the same or similar offenses is a denial of due process or equal protection is without merit...Guilt or innocence cannot be made to depend on the question of whether other parties have been prosecuted for similar acts." See also In Re Kinlein, 15 Md. App. 625, 645 (1972)]. For the above reasons, the thirty-two Motion 55 were denied on June 1, 1979.

7. Subpoenae Duces Tecum

(Calvert Ross Bregel, Esq., Ann McKenrick Turnbull, Esq., Robert L. Weinberg, Esq.; Eli Frank, Jr., Esq. and William R. Dorsey, III, Esq.).

Respondent also intended to prove that his fees were

not excessive by seeking to compare them with fees charged by other attorneys in the Baltimore area. Thus he issued subpoenae Duces Tecum[56] to the above attorneys which process was met by Motions to Quash[57] and Protect.[58]

However, on June 15, 1979, Bar Counsel noting on-the-record discussion on June 13, 1979, withdrew the following charges:

Malcomb

Paragraph 22 of the Petition[59] - allegation of violation of DR-2-106(A) [clearly excessive fee] and DR-6-101(A) (3) [neglect a legal matter entrusted to him].

Jarvis

Paragraph 11 re payment of one-half of a medical bill and Paragraph 15 - allegations of violation of DR 2-106 (A) and DR 6-101(A) (2) and (3). As mentioned, however, all of the Jarvis charges were withdrawn on June 19, 1979.[60]

Draper

Paragraph 16 - violation of DR 2-106(A) [clearly excessive fee] and DR 6-101 (A) (3) [neglect a legal matter entrusted to him].

Inasmuch as there remained no excessive fee charges against Respondent, the aforesaid subpoenae Duces Tecum were quashed.[61]

8. Motion for Summary Judgment

On April 24, 1979, Respondent moved for Summary Judgment[62] and "refers, and incorporates by reference the deposition of the Respondent which was taken on April 18 and 19, 1979, and is made a part hereof."[63] After full hearing[64] and consideration of Respondent's deposition, Bar Counsel's

answer and affidavits, the Motion was denied.[65]

9. "Motion to Disqualify Judge Levin"

a. First Motion

On May 23, 1979, Respondent filed three motions to disqualify the undersigned.

The first stated that "The father-in-law of Judge Levin, Jacob J. Edelman, Esq., is believed by the Respondent to be a necessary witness in this case and he intends to call him as a witness in this case."[66] When the court asked Respondent if he meant a character witness, Respondent said he considered him "to be a necessary witness, one reasonably necessary witness upon one of the important issues in this case."[67] Respondent later stated that the paramount issue "in this case" is the "propensity for truth and veracity, for upright dealings for frankness and for honesty of the Respondent. I will be calling Councilman Edelman on that question."[68]

This motion was denied.[69] As a matter of fact, Respondent never"called" this court's father-in-law as his witness nor did he ever summon him.

b. Second Motion

The second[70] stated that undersigned made a "misapprehended statement" that Respondent communicated to J. McDaniel that Malcomb (a Respondent client) was a homosexual (and that undersigned read parts of "the file" which had never been admitted in evidence and which might well be inadmissible in evidence.")

In order to understand Respondent, some chronology is required. When undersigned was assigned this matter by the Court of Appeals, he undertook to read the entire file wherein instant charges were transmitted. The developing file also contained, inter alia, Bar Counsel's Request for Admission of Facts and Genuineness of Documents which asked Respondent to admit, inter alia, the genuiness of "(h) Photostatic copy of a letter consisting of two pages dated July 30, 1976, from you (Respondent) to 'Honorable Judge McDaniel' "and" (j) Photostatic copy of a letter consisting of two pages dated August 5, 1976 from you (Respondent) to John D. Malcomb."

In all, there were twenty-three requests for "genuineness" and forty-six requests for "truth" filed as to Malcomb alone.[71] The undersigned had read all of these as well as all other documents in the file before the hearing on May 15, 1979 (demurrer hearing). These documents included, inter alia, those Exhibits Respondent attached to his Motion to Disqualify (letter of July 30, 1976 to "Judge McDaniel" from Respondent and letter of August 5, 1976 from Respondent to Malcomb). As the pleadings poured in, this court attempted to keep abreast of all of them together with Exhibits and, as explained to Respondent,[72] this court had an obligation to read pleadings and Exhibits. If, in fact, some of the reading included material which might later prove to be inadmissible for some reason or other, a non-jury judge is not irremediably tainted. If he explicitly excludes it from his consideration, he is presumed able to be impartial nonetheless - unlike a jury. State v. Hutchinson

260 Md. 227, 233-234 (1970). This court felt, and feels, strongly that it had a duty to read all papers and documents in the official file but/yet still maintain the ability to disregard inadmissible material. id.

At the demurrer hearing on May 15, 1979, Respondent made a prolonged argument, much of which was in the nature of a "speaking demurrer"[73] (as he himself conceded)[74]. Among other things, he attacked his former client, Malcomb, as a homosexual who had in his effects homosexual literature.[75] While this derogatory attack was obviously improper demurrer argument, it brought to the court's perception Respondent's same genus of statement about his client as contained in his letters to "Judge McDaniel" (July 30, 1976) and Malcomb (August 5, 1976).

In the July 30, 1976 letter to the judge, Respondent said he understands Malcomb indicated his considerable chagrin at the delay -- whereupon Respondent's comment is "too bad" -- and Respondent then told the judge that "Mr. Malcomb, whom I suspect may have had a considerable number of derogatory things to say about me to the court, has his own highly personal reason for wishing to have this Order signed in haste and which I do not wish to discuss further" (part of the underlining supplied).[76]

In his August 5, 1976, letter to Malcomb, Respondent spelled out his implicit message about Malcomb to the judge stating "I refrained from going into further detail with Judge McDaniel, but will not refrain from going into further detail with you."[77]

He/then referred heavily to "homosexual activity" and "gay pornographic photographs" stating that "they were deeply consequential" (to Respondent). He warned Malcomb "not to write any further neurotic letters to the judge, unless you wish to endanger your award of custody which has been made to you"[78] (Judge H. Kemp McDaniel was the presiding judge in the Malcomb custody case).[79]

Because Respondent's derogatory demurrer argument concerning homosexuality and homosexual literature ("Now remember this is a case which was won under the worst of odds; a homosexual who had in his effects homosexual literature")[80] triggered some recollection of the Respondent's two letters in the file, this court mentioned that "Because somewhere I have read... that Mr. Kerpelman wrote a letter to the judge, wrote two letters, I believe...and in one he said, made mention of Mr. Malcomb being a homosexual and some other situation about pornographic literature but I am not permitted to consider that, am I, for the purpose of the demurrer?"[81]

and

> "I shall not use that in arriving at my determination, even though I have read that in the past, in certain pleadings and even though Mr. Kerpelman has argued today about pornography and sleeping or taking a shower with a female child and homosexuality by Mr. Malcomb but I do not believe I could consider those matters at all." (emphasis supplied)[82]

Respondent than objected that he had not written to the judge that Malcomb was a homosexual and while, at first, this court thought he had, it developed that Respondent's

explicit reference to homosexuality was not contained in the July 30, 1976 letter to the judge. This court stated again, "But in any event, in none of that have I considered with respect to the demurrer"[83] and "The court didn't consider it. The court specifically said that it was not considered."[84]

It was felt then and it is felt now that the reference to Malcomb's homosexuality was something improperly intruded into the demurrer argument by Respondent himself and if he had not done so, there never would have been any reference to it by this court. In fact, this court specifically stated that neither Respondent's improper argument nor his two letters would in any way be considered in any ruling. This court was glad to know that Respondent had not specifically written the judge about Malcomb's homosexuality but any initial "misapprehension" did not, and does not, show bias. Hence his second motion was denied.[85]

c. Third Motion

Respondent was fully heard as to this motion[86] but it was found to be without merit for the reasons stated on May 23, 1979.[87] These reasons are still found to be completely tenable.

ISSUES

The issues presented for determination are as follows:

Draper

1. Did Respondent agree that his representation of Draper would cost "about $1,000.00" at a time when Respondent intended to charge more based on certain factors including a successful result?

2. Did Respondent violate any Disciplinary Rules by advising Draper to retrieve (meaning illegally child snatch) the child from Syracuse, New York in flat violation of a modified court decree awarding custody of the child to Draper's former wife (mother of the child)?

3. Did Respondent violate DR 1-102(A)(5)[89] by his alleged conduct in 1 above?

4. Did Respondent violate said latter Disciplinary Rule by his alleged conduct in 2 above.

5. Did Respondent violate DR 1-102(A)(6)[90] by his alleged conduct in 1 above?

6. Did Respondent violate said latter Disciplinary Rule by his alleged conduct in 2 above?

7. Did Respondent violate DR 2-110A)(2)[91] by allegedly refusing to deliver to Draper, the decree of modification (or copy) of March 23, 1977 (awarding custody to Draper - the result sought by Draper and objective in his hiring Respondent) after the modification hearing and after Draper discharged Respondent? Did he further violate said Disciplinary Rule by not avoiding foreseeable prejudice to Draper before he withdrew his representation of Draper and by doing nothing for Draper in the face of danger of additional litigation?

8. Did Respondent not violate DR 6-101(A)(2)[92] by lack of adequate preparation, in that he never conducted discovery, never interviewed any witnesses nor had in person interviews with Draper?

9. Did Respondent not violate DR 7-102(A) (7)[93] and 7-106(A)[94] by his alleged conduct in 2 above?

Malcomb

1. Did Respondent violate any Disciplinary Rules by making an agreement with Malcomb that his representation of Malcomb would cost One Thousand Dollars ($1,000.00) and yet intended, at the time of the agreement, to charge an additional fee based on certain factors, including a successful result?

2. Did he further violate any Disciplinary Rule by allegedly misrepresenting to Malcomb that his case was not yet resolved in the judge's mind until the August 9, 1976 decree was signed and that he was working on the case, when in fact, the judge's ruling was on July 20, 1976 (and the only matter remaining was the drafting and approval of the Order) and Respondent was not working on the case at all but rather trying to give the appearance of work in order to exact an improper fee from Malcomb.

3. Did Respondent violate any Disciplinary Rule by furthering a fraud on the court in not advising the court that the Malcomb decree was based on a fraudulent decree, i.e., a backdated separation agreement?

4. Did Respondent violate DR 1-102(A)(5)[96] by his alleged conduct in paragraph 1, 2 and 3 above?

5. Did Respondent violate DR 102(A)(6)[97] by maliciously escalating his fee to Malcomb and attempting to obtain improperly an improper fee from Malcomb in the absence of any fee agreement by Malcomb and in the absence of any basis therefor and by using the courts to obtain such improper fee?

6. Did Respondent violate said latter Disciplinary Rule by his alleged conduct in 2 above?

7. Did Respondent violate DR 2-110(A)(2)[98] by improperly withholding Malcomb's papers and the decree after being discharged by Malcomb?

8. Did Respondent violate DR 6-101(A)(2)[99] by lack of adequate preparation in that he conducted no discovery, interviewed no witnesses before trial, called witnesses who were of little or no probative value, failed to call witnesses who were of probative value and generally displayed no knowledge of the facts surrounding the Malcomb case?

THE DRAPER CASE

Issue One - Did Respondent agree that his representation of Draper would cost "about $1,000.00" at a time when Respondent intended to charge more based on certain factors including a successful result?

Findings of Fact

Draper, age twenty-six at instant hearing, was married to Marlene Boetker (Marlene) on July 29, 1970.[100] One child, Jennifer Britton Draper (child) was born of this marriage on March 19, 1972.[101] On October 15, 1974, Marlene sued Draper for an absolute divorce on the ground of mutual separation and sought custody of the child;[102] Draper admitted all of her allegations[103] by his answer (agreeing it was a "non contested divorce case").[104] On January 7, 1975, Marlene and Draper were divorced absolutely,

Marlene was granted custody of the child, Draper was awarded "reasonable rights of visitation" and ordered to pay Twenty-five Dollars ($25.00) per week child support (Decree).[105]

Draper felt later that the child was living in an "unfit environment" and wanted to "change custody."[106] When he met Respondent in April, 1976 at a meeting of Fathers United for Equal Rights (FUER), he asked Respondent how much Respondent would need "for the case" and he says he was told "about $1,000.00" by Respondent (court costs would be extra).[107] Draper asked Respondent "...is that good? You know, is that what I can count on? And he said yes." T. June 18, 1979 at 170. According to Draper, Respondent also told him he (Respondent) would need a Five Hundred Dollar ($500.00) retainer "to start procedures."[108] Shortly thereafter (April 15, 1976), he obtained a Five Hundred Dollar ($500.00) Money Order[109] and sent "your retainer of $500.00" to Respondent together with the original of the Decree on approximately April 16, 1976.[110] On May 14, 1976, Respondent filed a petition on behalf of Draper, to modify the custody part of the Decree.[111] Respondent specifically signed his (Respondent's) name to the petition which, inter alia, stated that the Decree (sought to be modified) "awarded custody of the minor child...to [Marlene]."[112]

In the latter part of 1976, Draper received a bill from Respondent (dated July 28, 1976) stating "BALANCE NOW DUE" $460.00[113] to which he responded by purchasing a Money Order for Four Hundred Sixty Dollars ($460.00) on September 7, 1976.[114] He and Respondent had "set up a date" because Draper wanted to

discuss the case with Respondent and so Draper went personally to Respondent's office. When Draper got there, Respondent "wasn't there so I paid his secretary the money."[115] At Draper's request, Respondent's secretary gave Draper a receipt which stated, inter alia, "Balance Paid"[116] (he asked "to make sure everything was paid and that I had proof of it")[117].

In August, 1976, Draper heard that Marlene had moved out of Maryland and that the child was living in a "bad environment." He went to Syracuse, New York/(where the child and Marlene resided) on August 21, 1976 with Marlene's/ estranged husband and two male friends and "we rushed in and obtained my child."[118] This retrieval was in flat violation of the Decree.[119] On September 3,1976, Respondent, on behalf of Draper, filed a "petition for immediate hearing" asserting that Marlene was living with a "boyfriend" charged with rape and breaking and entering "who beat the child" and asked for an immediate hearing (for change of temporary custody) because "this is an emergency situation."[120] Although Draper swore to these "facts" on August 31, 1976, by way of attached Affidavit, neither he nor Respondent informed the court of the illegal child snatch.[120A] Thereafter, Marlene filed a petition for contempt on September 30, 1976, asserting that she had moved to New York to "avoid continued harassment" by Draper and that he "broke into her apartment in Syracuse, New York and assaulted her and snatched the child out of her bed."[121] On

March 23, 1977, after hearing, the Decree was modified by granting custody of the child to Draper (Beardmore, J.).[122] The next day Respondent billed Draper Eight Hundred Fifty Dollars ($850.00) for "additional final fee based on fully successful conclusion of case"[123] whereupon Draper wrote Respondent a letter of outrage informing Respondent he did not "intend to pay a cent" and was "taking this matter to the American Bar Association."[124]

In April, 1977, Draper wrote Respondent discharging him as Draper's attorney.[125] [The Court of Special Appeals meanwhile reversed, Draper v. Draper, 39 Md. App. 73 (1978), and on remand, Marlene was granted custody of the child by subsequent decree of April 14, 1978 (Williams, J.).][126] On June 6, 1977, Draper filed complaint with the Attorney Grievance Commission.[127]

The sole dispute is whether Respondent told Draper that the (about) One Thousand Dollars ($1,000.00) was a "flat fee"[128] or whether it was a retainer. Respondent contended he had a retainer arrangement and that there never was a "flat fee basis." He testified that custody cases are unpredictable and that he rarely represented custody cases on a flat (or "set")[128A] fee basis.[129] He argued[130] that when his secretary gave Draper a receipt marked "Balance Paid", she was "newly hired, had not been authorized to determine when any fee was paid in full and had never before given a receipt to a client."[131]

He referred to his "temporary note" which purported to show "Retainer fee $950, $500 down" [131A] and bill of June 23, 1976 which purported to be a bill from him to Draper indicating a "Retainer Fee" of $950.00. [131B]

His theory was that there was an "implied contract" between himself and Draper and that it was proper (under a "DR Rule" which he did not number) [131] to charge the additional fee "based on the successful result - that he obtained custody." [132] At other times, Respondent believed he had a "verbal agreement" [132A] as to fees.

Draper denied receiving the June 23, 1976 bill from Respondent [133] and when Draper testified at instant hearing, Respondent did not cross examine him about it. When Draper wrote his letter of outrage to Respondent, he specifically informed Respondent that he had paid Respondent a total of "$960.00 which <u>you</u> quoted to me. The total which you want would bring the amount to $1,810.00 which is double and not what was told to me." He told Respondent he "<u>had</u> great trust and respect for you...but I am very disappointed." [134] Respondent responded to the letter of outrage by his (Respondent's) letter of April 25, 1977 to Draper which expressed surprise that Draper would question the additional Eight Hundred Fifty Dollar ($850.00) bill and Respondent was "rather offended" at Draper's suggestion of "overcharging." Yet Respondent nowhere mentioned the June 23, 1976 bill (which would have cleared up the matter, it

would seem).

In addition, Respondent's notion of an "implied" contract leaves much to be desired. As an attorney with thirty years experience[135] dealing with a(high school educated) plumber,[136] the client was at Respondent's mercy. He furnished his client with no guidelines as to what future fees would be and the "additional" Eight Hundred Fifty Dollar ($850.00) bill was devised solely by Respondent. At no time did Respondent discuss the additional fee with his client before he sent it for payment. A short and simple letter to Draper setting out the fee agreement alleged by Respondent would have obviated any misunderstanding. Respondent's failure to observe the plain common sense of Ethical Consideration 2-19 left much to be desired as has been said.[137]

Conclusion of Law

Despite all of the highly suspicious circumstances, I cannot find by clear and convincing evidence that Respondent intended to improperly charge a fee to Draper in violation of their fee "agreement." Respondent is entitled to the presumption that Draper received the June 23, 1976 bill and Draper's denial of receipt (by way of answer to interrogatories)[138] is simply not sufficient to overcome the finding that Respondent sent it and Draper received it. If Draper received it, he was on clear notice that the payment of Nine Hundred Sixty Dollars ($960.00) was a retainer and not a "flat fee."

Issue Two - Did Respondent violate DR 2-110(A)(2) by allegedly refusing to deliver to Draper, the decree of modification (or copy) of March 23, 1977 (awarding custody to Draper - the result sought by Draper and objective in his hiring Respondent) after the modification hearing and after Draper discharged Respondent? Did he further violate said Disciplinary Rule by not avoiding foreseeable prejudice to Draper before he withdrew his representation of Draper and by doing nothing for Draper in the face of danger of additional litigation?

Findings of Fact

Draper discharged Respondent as his attorney in April, 1977.[139] On May 13, 1977, Marlene's attorney wrote Respondent concerning certain visitation problems.[140] Respondent then wrote Draper, on May 23, 1977, telling Draper to give the matter his earliest attention (he also said he didn't wish to become involved "in any further services upon your behalf" because Draper refused to pay the "reasonable final fee bill").[141] At all of these times, Respondent did nothing on behalf of Draper. Respondent then filed a form "Motion to Strike Appearance" on June 2, 1977[142] and on June 20, 1977, leave was so granted.[143]

Previously, Draper asked Respondent for a copy of the "Decree" (meaning the Decree of Modification whereby the court awarded custody of the child to him).[144] Obviously Draper needed the Decree to prove the legal validity of his custody. Respondent refused stating he would obtain it when the "outstanding" bill was paid.[145] He asserted an "attorney's lien."[146]

Conclusion of Law

Despite Bar Counsel's contention that Respondent violated DR 2-110(A)(2) [because the fee was outside the scope

of their agreement" and hence the attorney's lien was an "improper assertion"], I do not conclude that Respondent did so violate it. When Respondent received the letter from Marlene's attorney, he promptly wrote a letter of alert to Draper. As to the attorney's lien, it is recognized in Maryland, AGC v. McIntire 286 Md. 87, (1979) as a "passive lien on the papers, securities and money belonging to a client coming into the lawyer's possession." The Court of Appeals in Ashman v. Schecter, 196 Md. 168, 173 (1950) also mentions "all papers, securities and money" referring to them as "such things." While the Disciplinary Rules state that the attorney shall "deliver to the client all papers" (emphasis supplied), the appellate decisions also state the right of an attorney to retain all papers, id. at 173. If the purpose of the lien is to protect an attorney from non-paying clients, then it cannot be said that Respondent improperly asserted the attorney's lien.

If I cannot conclude by clear and convincing evidence that Respondent charged an improper fee, then I cannot conclude by clear and convincing evidence that Respondent improperly retained the Decree.

Issue Three - Did Respondent not violate DR-6-101(A)(2) by lack of adequate preparation, in that he never conducted discovery, never interviewed any witnesses nor had in person interviews?

Findings of Fact

All of the findings of fact set out at 22-27 and 28 infra are incorporated in instant findings of fact.

The face to face contacts between Respondent and Draper were as follows:

a. Brief discussion at FUER meeting in April of 1976 dealing with fee.[147]

b. Twenty minutes on November 18, 1976 when a "merits" hearing on the modification petition was to take place.[148] It never took place.[149]

c. Hearing on modification petition on March 23, 1977.

Other than these, most of Respondent's contacts with Draper were by telephone calls to his staff[150] and letters.[151]

There was only one adversary hearing in the Draper case, that on March 23, 1977 - the matter of Draper's modification petition[152] (when Draper was absolutely divorced, he was not represented by Respondent but by Stanley Sollins, Esq.).[153] After Draper was cited for contempt when he "violated a court order by grabbing the child in New York,"[154] there is no record of any hearing on the specific issue of contempt (nor was Draper ever found guilty of contempt).[155]

Respondent produced two witnesses at this March 23, 1977 hearing: Draper and one Bertha Tawney. As to Bertha Tawney, Respondent did not interview her before he put her on the stand.[156] Respondent feels that "personal interviews are not necessary"[157] (of witnesses before trial) nor did he conduct any in the Draper case.[158] He conducted no discovery either, that is, he filed no interrogatories, notices for production, etc., requests for admission, nor conducted any depositions.[159]

The custody report of Judith Finn (a social worker of the Anne Arundel County Department of Social Services) was received in Draper's case. It recommended that Draper receive custody of the child and the trial court, relying heavily on her report, awarded custody of the child to Draper. The trial court would not allow Marlene's attorney to cross examine Ms. Finn during Marlene's case but, on appeal, the Court of Special Appeals stated that "a court appointed investigator in a custody case occupies the position of an officer of the court and at the request of either party, may be called as the court's witness, subject to cross examination by both parties." Draper v. Draper, 39 Md. App. 73, 81 (1978) [the trial court was reversed on a different ground]. After hearing, the court decreed custody to Marlene on April 14, 1978 and there was no appeal nor have there been any proceedings since then. 160

While Respondent's representation of Draper is surely not a paradigm of competence or adequacy, this court cannot find by clear and convincing evidence that he handled the Draper matter "without preparation adequate in the circumstances."

His failure to interview personally Bertha Tawney, for example, was of obvious detriment to his client because Respondent was forced to claim "surprise" after her first substantive answer. 161 If he had interviewed her (or taken her

deposition), he would have known, at the outset, that she was not present at time felt to be significant by Respondent.[162] Actually, the "surprise" rule was not applicable because Respondent had never even talked to his witness (he only had talked to Draper). The refusal of an attorney to personally interview a witness can logically lead to problems (sometimes severe) because the attorney is left to rely only upon the biased version furnished by his client - a version that may not be true nor accurate. That is precisely what happened with Bertha Tawney because when Respondent claimed surprise, the trial court asked "This is a different story than what you were previously told?" and Respondent was obliged to reply "By my client, yes" (emphasis supplied).[163] [Respondent wanted to show that when Marlene came to the house with a policeman, the child ran to Draper. When Bertha Tawney said she was not present at that particular time, Respondent was forced to desist from further questioning. (He never produced the policeman as a witness either).]

In addition, the failure to know what your witness will say in testimony can waste everybody's time: the court's, the witnesses, the attorneys and the parties. It is to be noted that Respondent understood the value of discovery as when he remonstrated with an opposing lawyer (Eidleman) in the Draper hearing ("If you spent a little more time on interrogatories and more preparation, you might be..."[164]). Respondent asserts

that in custody cases "You don't know how many witnesses the other side is going to produce in a domestic case and particularly in a custody case. You don't know what the facts are going to be, you don't know how they are going to expand by the time the case comes along."[165] However, if he had filed interrogatories, he would have known how many witnesses and what the facts would be; if he had interviewed or deposed witnesses, he could prevent them from "expanding." Respondent himself makes out a persuasive case of his own inadequacy.

Nor is Respondent's assertions that he "won the case" convincing. The essence of the trial court's decision to award Draper custody was based upon the social worker's report ["The court relies heavily on the report of Judith Fim and the Department of Social Services," Draper v. Draper, 39 Md. App. 73, 77 (1978)]. One might say that the report won the case for Draper. No matter what was responsible for the "win," it was short-lived in any event because Draper no longer has custody (the trial court was reversed and the child is now in the custody of her mother).

Conclusions of Law

However, this court cannot find by clear and convincing evidence that Respondent's representation was so inadequate as to conclude that he violated DR 6-101(2). While Respondent's failure to utilize obvious tools was probably dictated by his desire to avoid costs (he claims he would have to pass on such costs to his

clients)[166] the line between trial tactics and adequacy of preparation can sometimes be blurred. Experts in the field of family law feel that the "first interview" is of tremendous significance. They advise office interviews of a minimum of one to two hours uninterrupted by any distractions.[167]

Contrast that with Respondent's telephone theory "It is totally unnecessary for human beings to communicate information one to the other, that they be in the same room and it has not been so since the invention of the telephone and in fact far before."[168] In fact, Respondent is apparently proud of his lack of office interviews even boasting that some of his clients "never see nim until the day they go to court."[169]

Respondent's irresponsible boast that some of his clients never see him until the day of trial can easily backfire on him. In fact, conduct even less reprehensible may subject an attorney to malpractice. Compare Bevevino v. Saydjari, 76 F. R.D. 88, 96 (S. D. N.Y. 1977) [attorney's failure to prepare defendant's doctor for his deposition prevented him advancing a valid defense - court suggests malpractice suit to doctor]. On the other hand, the conscientious attorney must not be required to spend his (and his client's) money needlessly. Nor should there be overdiscovery. J. L. Ebersole, Discovery Problems: Is Help on the Way? 66 A.B.A. J. 50 (Jan., 1980). But note the word "conscientious" however. This should require, de minimus, an effort to inform the client and involve him in decisions about discovery. Regular discussion will not just make it harder for

clients to complain later, but will generate sympathy for the attorney who treats his client as a person in a mutual undertaking rather than as a child. While a reasoned decision as to whether to pursue a particular avenue of discovery is within an attorney's discretion, Identiseal Corp. v. Positive ID Systems, 560 F. 2d 298, 302 (7th Cir. 1977), certainly the total absence of discovery may well be outside the bounds of discretion. See generally W. Barthold, Negligence in Discovery: No Paper Tiger, Litigation, vol. 6, Fall 1979 at 39.

It must be noted, however, that Bar Counsel has specifically dropped the "neglect" violation against Respondent leaving only the inadequate preparation charge. Since Respondent knew he had a favorable report from the Department of Social Services and since he may have anticipated that the judge might be favorably impressed by the neutral and experienced source, it cannot be said that he was required to have prepared additionally. I really cannot conclude by clear and convincing evidence that Respondent has violated the latter rule under the circumstances.

Moreover,the "inadequacy" Disciplinary Rule nowhere spells out any guidelines for instruction in this Orwellian field, Brown, ABA Code of Professional Responsibility: In Defense of Mediocrity 5 Valparaiso L. R. 95, 99 (1970), and before one may find punishable inadequacy, a stronger case must be presented. Some observers feel attorney conduct must reach proportions of grossness. 24 Hasting L.J. 675, 693 (1973), while others feel the standard of care may be more closely akin to negligence. Zilly, Recent Developments in Legislative Malpractice Litigation

(Litigation, Vol. 6, No. 1, Fall 1979 at 8, 17, 64). The American Bar Association Committee on Ethics and Professional Responsibility declined to give meaningful responses to various questions that could have provided a more workable definition. The "inadequacy" Disciplinary Rule" is vague and general. Canon Six's Ethical Considerations nowhere enlightens us as to the meaning of "inadequacy. No mention is made of duties of investigation and preparation, conferring with the client "early and often," frequently advising him ascertaining and developing strategies, filing appropriate motions (to produce, to request admission of genuineness and authenticity), the duty to personally interview clients and witnesses and the duty to file interrogatories and when necessary, take depositions. One wants to raise the competency of attorneys to at least a minimum level but one also worries about the lack of specificity of the inadequacy Disciplinary Rules. See generally Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702 (1977).

170

In sum, while Respondent's representation was spotty and somewhat deficient, this court cannot find by clear and convincing evidence that Respondent handled the Draper case without preparation adequate in the circumstances.

Issue Four: Did Respondent violate any Disciplinary Rule by advising Draper to retrieve (meaning illegally child snatch) the child from Syracuse, New York in flat violation of an unmodified court decree awarding custody of the child to Draper's former wife (mother of the child)?

Findings of Fact

The Decree of January 7, 1975 unequivocally granted Marlene custody of the child with reasonable visitation rights

to Draper.[171] From January 7, 1975 to August 21, 1976, there was no modification of the Decree. Draper met Respondent in April, 1976 and retained him to "change custody" because he felt the child was living in an "unfit environment."[172] After Draper paid Respondent his fee, Respondent filed a petition for modification on Draper's behalf on May 14, 1976, asking that Draper be awarded custody.[173] On May 17, 1976, the court, per the clerk, issued an Equity Subpoena to Marlene at 139 Rigi Avenue, Syracuse, New York 13206 (to answer or defend).[174]

In early August, 1976, Draper was told by his former mother-in-law that Marlene had moved out of the state and that she was living with a criminal. Draper twice consulted with Respondent on the telephone in early August, 1976 asking him if "something could be done about this." Respondent suggested that Draper get the child "but not to say anything to anybody about it, because it was not the procedure of attorneys." Respondent told Draper that when he went, "not to make it a breaking and entering charge type of thing but to try to get in without breaking the door down, and, you know, just get my child." Respondent also told Draper that if he (Draper) were successful "we might get a faster response from the court" and that it might show "good concern on my part."[175] On August 21, 1976, Marlene was living with the child in Syracuse, New York (and a man named Jerry Cushman - later convicted of breaking and

entering).[176]

On that date, Draper went to Syracuse, New York with the estranged husband of Marlene (Gary Boetker)[177] and two other males ("case her boyfriend gave us some trouble"[178], and "we rushed in and obtained my child"[179] (from her bedroom).

On September 3, 1976, Respondent filed, on Draper's behalf, a petition for immediate hearing asking for a change of temporary custody "because this is an emergency situation."[180] He mailed it to Marlene on August 31, 1976 just ten days after the child snatch. The upper left of the petition indicates it was typed three days after the child snatch (August 24, 1976). Neither Respondent nor Draper advised the court of the physical seizure of the child. On September 30, 1976, Marlene petitioned to hold Draper in contempt[181] and on the same date, the court (Wray, J.) ordered Draper to return custody of the child to Marlene pending litigation of the matter of modification.[182] On March 23, 1977 after hearing, the trial court awarded custody of the child to Draper (Beardmore, J.)[183]; his decree was reversed by the Court of Special Appeals, Draper v. Draper, 39 Md. App. 73 (1978); and on April 14, 1978, the trial court (Williams,J.) awarded custody of the child to Marlene with reasonable rights of visitation to Draper. The matter thus came full circle.

I find as a fact that on May 14, 1976, Respondent knew of the Decree. Aside from the fact that Draper sent it to him in April, 1976 when he paid Respondent his fee,[184] the petition

for modification prepared, drawn and filed by Respondent, "moves that this court modify its Decree concerning child custody" says the parties were divorced by "Decree...dated January 7, 1975" and prays the court to modify "its" Decree.[185] Although Respondent seemingly denied seeing the decree till he gave his deposition (in the instant case in 1979), he acknowledged that "this was besides the point, because my notes show that the wife had custody" and "that would sort of indicate that Mr. Draper would very well have given me those papers, but at any rate, I was accurate that Mr. Draper's wife had custody."[186]

I find as a fact that in August, 1976, Respondent did suggest to his client, in flat violation of the Decree, that he (Draper) physically take the child from the Syracuse residence where she was living with her mother; that it was Respondent's, and not Draper's[187] suggestion; that Respondent told Draper to not make it look like a breaking and entering but just to get the child; that if it was successful, "we" might get a faster response from the court and it would show good concern on Draper's part; and that Respondent told Draper not to say anything to anybody about it. I find further that the idea of taking Gary Boetker and the two men was Draper's,[188] not Respondent's (but that Draper's idea emanated directly from Respondent's suggestion that Draper not break in. Thus Draper took Marlene's estranged husband to trick her into opening the door).

At first, Respondent denied that he had advised Draper between April, 1976 and August 21, 1976 that he should "retrieve" the child then in Marlene's custody as per the Decree [(i) "False. The Respondent does not remember using any such quoted imprecation to Mr. Draper..."][189]. However, he later shifted ground, admitting he <u>had</u> used the word "retrieve."

I find as a fact that Respondent testified before the Inquiry Panel on January 28, 1978 as follows:[190]

1. "...when you have performed a child snatch, as any number of my clients, on my advice, have done..." [191]

2. "...Now we had that hearing and then -- oh, before that I had planned carefully with Mr. Draper just how he was to retrieve the child. Well, first of all, whether to retrieve the child and the answer to that was clear. And we planned how to retrieve the child." 192

3. "I think I did more than he realizes. There was the pre-planning, there was the snatch, there was this first hearing." 193

Despite the Respondent's protestations that when he said "retrieve" what he really meant was to <u>legally</u> retrieve, his testimony is fatuous and entirely unconvincing. He testified that in his view, retrieval means:

> "the legal plan, the pleadings that would be filed, the setting of having the case brought promptly before a judge, also the legal possession that would be established that Mr. Draper, having a right to reasonable visitation, which has been denied him, had a right also. This legal position is what was carefully

> planned on retrieving the child, that is, retrieving the child back into his court ordered custody is what I'm talking about. I'm talking about getting the child ordered by the court in a decree to be turned over to the custody of Mr. Draper." 194

He testified further that:

> "I was planning with him, and preparing myself, for the legal position that since he had the right to reasonable visitation and since the child was being held with a promiscuous mother, living in the same with an alleged felon, that for him to ask to take the child back from here for his visitation is one thing he could have done, that was part of the planning... Another part of the planning was to try to get an immediate court order concerning return of the child." 195

However, it is clear that a commonsense view of Respondent's(Inquiry Panel)use of the word "retrieve" is that he meant to <u>physically</u> <u>take</u> the child. Aside from common sense, Respondent (himself) <u>invariably</u> uses the word "retrieve" to mean <u>take</u>:

1. "I'll have to ask the court to bear with me. I'd been here about ten minutes early,and at that time was unable to retrieve my files." 196

2. "Did I throw them in the waste basket? Have I retrieved them from the garbage dump or what?" (Respondent is the questioner). 197

3. "Q. How were they brushed aside physically, you tell us.

   "A. You put your hand out and pushed them aside.

"Q. Where did I push them to?

"A. It would have been over in front of me or over towards the center of the table.

"Q. Did I then use those notes later in the trial or not?

"A. I don't believe so. You may have. I don't believe you used those in the way I'm talking about.

"Q. Did you retrieve them?

"A. Did I what?

"Q. Retrieve them?

"A. Oh. Thank you. No sir. You retrieved them. You showed them in court." (Respondent is the questioner). 198

4. "He goes and retrieves his child..." 199

5. "Just that at the time the child was retrieved..." 200

6. "Yesterday evening I went down to my basement and was able to retrieve a file." 201

7. In his deposition, he testified that "Draper has been on the risk to retrieve the child*from New York" but "explains" that "it was not a careful and an accurate use of the word." 202

His labored and tortured attempts to explain away his earlier sworn testimony (before the Inquiry Panel) are totally unconvincing. He refers to a Random House dictionary definition but must acknowledge that the first definition is "recovered, regain." He then twists the word to mean that Draper was trying Respondent's use of "retrieve" in his everyday use is thus equated with his use of "retrieve" as concerns Draper's physical taking ("on the risk to retrieve the child") (emphasis supplied).

retrieve his visitation right. Draper, however, clearly stated that the purpose of the child snatch was to remove the child from the bad environment (not visit). (T. June 18, 1979 at 171).[203]

If he meant "retrieve" in the sense of obtaining a valid court order, he does not explain why there was no hearing before Draper retrieved the child. As to the petition for immediate hearing, it was filed after the retrieval thus further negating Respondent's motion of legal recovery. Respondent speculates that the petition could have been dictated before the retrieval but here too his position is unconvincing. If indeed his secretary was slow in typing this petition, surely Respondent would have known when he filed it (September 3, 1976) that the retrieval had already taken place. Respondent tries to argue that the petition was sent to Draper for his signature but one wonders why such a slow process was used if there was such an emergency. I find as a fact that Respondent knew of the retrieval (on August 21, 1976) at the time he filed the petition for immediate hearing (September 3, 1976). If Respondent's legal theory is correct, why would he not have obtained a signed court order in Maryland awarding temporary custody to Draper so that the New York authorities could honor it? In fact, Respondent offered into evidence exactly such an order but it was never signed by any court because it was never presented to any court.[204]

Respondent's visitation theory is totally unsupportable and totally unconvincing. A non-custodial parent simply cannot take three men with him and physically grab a child out of her

bed because he feels the custodial parent unfit. If he does so, his visitation rights may be completely denied. See Friedland v. Friedland, 174 Cal. App. 2d. 874 (1959) [father told friend "one way or other we will get the child" and had on several occasions broken into the custodial mother's home -- visitation denied]. Even if visitation rights are not denied [Anderson v. Martin, 257 S.W. 2d 347 (Tex. Civ. App. 1953)] reasonable visitation is not to be equated with a bald and illegal child snatch.

Respondent is obliged to admit that he advised any number of his clients to perform child snatches, yet he tried to expiate this admission by saying he only meant legal child snatches. By legal, he says he means taking your child before there is a court order. He acknowledges,[205] however, he made an "unfortunate choice of words" and he further acknowledges that he is "not saying that it (child snatch) cannot cover an illegal one."[206] His explanation is fanciful and absurd. He is hoist by his own petard.

It is interesting to note that when Draper testified at the March 23, 1977 hearing as to why he snatched the child, he testified that he went on Respondent's advice.[207] Thus Draper's exact same version was given before Judge Beardmore at a time when there was no complaint by him against Respondent, the same version was given before the Inquiry Panel; and the same version was given in instant case. Draper's testimony is entirely

consistent and credible as opposed to the testimony of Respondent - testimony which is riddled with self-contradiction, inconsistency and illogic. It is further interesting to note that when Respondent himself alluded to the fact that his client Draper testified that he (Draper) acted "on counsel's advice," Respondent did not contradict Draper at all. In fact, he (Respondent) suggested "it was an emergency situation...he (Draper) was doing the right thing."[208]

On direct examination, Respondent testified that he never advised a client to child snatch if there is a court order.[209] However, Bar Counsel produced a former client of Respondent's (William Brecka) who testified that when he asked Respondent to represent him,[210] Respondent told him in December, 1975, he would have to dismiss his then attorney, have a fee of Eight Hundred Fifty Dollars ($850.00 or Nine Hundred Fifty Dollars ($950.00) and "would have to be willing to do anything that was necessary to get custody of the children."[211] When Brecka pointblank asked Respondent what he meant, Respondent replied "I will deny it if I am asked, but you have to get the children and keep the children and go as far away as possible and stay away as long as possible."[212] When Brecka told Respondent he was going to take the children to Charleston, South Carolina, Respondent told Brecka "Don't tell me, I don't want to know. Just tell me when you're going."[213] [Brecka did take his three children to South Carolina and kept them in Charleston for five or six weeks but flew back to Maryland, the children returning with their mother].[214]

Respondent felt this evidence was inadmissible. However, a witness may be contradicted on collateral matters that are relevant to the issue on matters brought out in direct examination of the witness. See generally 98 C.J.S. Witnesses, Sec. 633 at 653. It was Respondent who first testified on direct examination that he had never advised a client to child snatch if there was a court order, thus offering his probity and consistency for the consideration of the trier of fact. Surely Bar Counsel can try to contradict particularly when the matter of child snatch and child custody constitute the basic issue. cf., Walder v. U.S. 347 U.S. 62 (1954) [on direct examination, defendant said he had never sold narcotics in his life; in rebuttal, government allowed to produce officer to testify he had seized heroin from defendant's home at unrelated time]; see also U.S. v. Epps, 438 F. 2d 1192 (4th Cir. 1971); Krider v. Hempftling, 137 S.W. 2d 83, 86 (Tex. 1940) [where one party offers evidence in regard to irrelevant matter, other party may not only inquire about it but he is entitled to offer evidence otherwise inadmissible].

Brecka also testified that Respondent "would, occasionally step over the line of from walking that fine line right on the edge of the truth or truth if you wish to put it that way, stepping over and stepping back" and "he is basically truthful, with a reservation that he would not tell you the whole truth 215 and that he could lie but on balance, he is truthful." Brecka was a self-employed building developer. He, other members of FUER and Respondent went to FUER meetings in Baltimore 216 City, Howard and Montgomery Counties. The Brecka testimony was admitted solely for the purpose of credibility and has not bee considered substantively. Finally, the evidence against Respondent

is so overwhelming otherwise, that even if the Brecka testimony were inadmissible, it would make no difference at all.

Conclusions of Law

This court finds by clear and convincing evidence that Respondent's conduct was in violation of Disciplinary Rules 1-102(A)(1), 1-102(A)(4), 1-102(A)(5) and 1-102(A)(6).

1-102(A)(4)

> A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

He practiced a fraud on the court which issued the decree of January 7, 1975 by suggesting, planning and helping to carry out an illegal and invalid child snatch in violation of the decree. He encouraged his client to violate the decree and he filed pleadings designed to consummate the violation.

1-102(A)(5)

> A lawyer shall not engage in conduct that is prejudicial to the administration of justice.

Respondent's conduct in calculatedly planning the violation of the decree is obviously conduct prejudicial to the administration of justice. Illegal child snatching has reached epidemic proportions (Baltimore Daily Record, February 5, 1980, vol. 184 No. 30 at 1) and conduct such as Respondent's strikes at the heart of the administration of justice. Respondent himself is aware of this ["The purpose of establishing Courts...is to prevent...people from engaging in self help. In the old days before there were courts, people would shoot each other...this is uncivilized.]

1-102(A)(6)

> A lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law.

Respondent's conduct quite clearly reflects on his fitness to practice law. For partisan purposes, he flouts the law. In so doing, Respondent tramples on the rights of the custodial parent and brutally deprives her of her child on the mere say-so of the non-custodial parent. The non-custodial parent - spurred on by Respondent - takes a young child without affording the custodial mother a chance to be heard. For her, due process is non-existent. Respondent also bulldozes the courts whose decrees are reduced to a nullity by him. Respondent's mentality leads him to conclude that "court orders are not holy writ."[218] While they are obviously not, they must be obeyed for the clear reason that if everybody did what Respondent did, chaos would surely ensue.

1-102(A)(1)

> A lawyer shall not violate a Disciplinary Rule.

Since the above Disciplinary Rules have clearly been violated, Respondent has therefore violated above Disciplinary Rule (a lawyer shall not violate a Disciplinary Rule).

Finally, I find by clear and convincing evidence that Respondent violated Disciplinary Rules 7-102(A)(7) and 7-106(A).[218A] (see discussion at 35-47 infra).

THE MALCOMB CASE

Issue One: Did Respondent violate any Disciplinary Rules by making an agreement with Malcomb that his representation of Malcomb would cost One Thousand Dollars ($1,000.00) and yet intended, at the time of the agreement, to charge an additional fee based on certain factors, including a successful result?

Findings of Fact

John D. Malcomb (Malcomb) at all applicable times was recruiting-hiring manager for Citicorp Financial, Inc. (and had been with the company for thirteen years). He was formerly married to Merle Burgess (Merle) on July 14, 1963[219] and two girls were born as a result: Kirsten, born April 26, 1965 and Heather, born April 13, 1968.[220] In March, 1973, Malcomb and Merle separated and on March 29, 1974, they were absolutely divorced. The Decree provided that the custody of the children was awarded to Malcomb with the right to Merle to visit at reasonable times.[221] Their separation agreement of January 16, 1974 was made a part of the Decree and it stated, in pertinent part, that Malcomb should have custody of the two it being agreed that Merle

> "is not waiving her right to the custody... but that both...feel that it would be to the best interest of the children at this time if the two children...were in the...custody of (Malcomb). (Merle) reserving the right to take custody of the two children at such time as her situation may change and as long as it will be in the best interest of the children."

(Merle also waived alimony). In November, 1974, Malcomb remarried (Kathleen).

In December, 1974, Merle (who had also remarried) had an attorney write Malcomb that she wanted to regain custody of the children and Malcomb selected Respondent to represent him. Respondent wanted a Five Hundred Dollar ($500.00) retainer which Malcomb sent him. Respondent sent a copy of Respondent's letter to Merle's attorney (a Mr. Pryor) to the effect that Malcomb had no intention of changing the agreement. Since Kathleen was ill, Malcomb decided not to continue with the case and Respondent agreed (to drop the case) and sent a Two Hundred Dollar ($200.00) refund to Malcomb in early January, 1975.

In the Fall of 1975, Merle tried to keep the children from Malcomb who then consulted a different attorney (Richard G. Bartholomee, Esq.). Over the Thanksgiving holiday of 1975, Malcomb had let the children visit with Merle but Merle insisted on keeping Heather contending she was ill (Malcomb did get Kirsten back). Malcomb became suspicious and called the doctor who said Heather was not ill. Although Malcomb again consulted Bartholomee, he did not react adequately, according to Malcomb. Malcomb then contacted Respondent to represent him to get Heather back.

The above constitutes undisputed facts. The following paragraph constitutes Malcomb's contention (disputed by Respondent). Respondent said it would be an uphill battle "and it is going to cost you One Thousand Dollars ($1,000.00)." Respondent agreed to accept Five Hundred Dollars ($500.00) in a few days, the rest in a couple of months "as long as I paid him the whole amount before the thing came to court."[222]

It is undisputed that after Malcomb paid Respondent the One Thousand Dollars ($1,000.00) (received by Respondent on December 16, 1975, February 11, 1976 and April 6, 1976), Respondent's bookkeeper[223] marked the deposit "Paid in Full."

It is undisputed that Respondent then sent Malcomb a copy of a letter from the court (re trial on April 30, 1976) with a typed note from Respondent stating, inter alia, that "It would be appreciated if the balance of my fee [Five Hundred Dollars ($500.00) bal.][224] could be paid before trial." Malcomb then sent the additional money as the result of receiving that document.

It is undisputed that the April 30, 1976 hearing was reset for June 8, 1976. On that day, the hearing took place (Judge H. Kemp MacDaniel presided) and lasted one day. The judge did not reach a decision that day. Respondent sent Malcomb a Six Hundred Fifty Dollar ($650.00) bill dated June 23, 1976 marked "Further retainer" received by Malcomb on the 25th[225] "probably."

Malcomb contends he disagreed with the bill and intended not to pay it but he felt that with Respondent's attitude[226] and the problems he had, "it was best to at least pay a token amount and then discuss the rest...of the fee with him after Judge McDaniel had made his final decision."[227] he paid him $50.00.

It is further undisputed that sometime after June 23, 1976, Respondent sent to Malcomb a copy of a June 23, 1976

letter from Respondent to Judge McDaniel confirming that the hearing set for July 12, 1976 would be instead on Tuesday, July 20, 1976 at 2:00 P.M. (attached was a note dated June 21, 1976 from the judge stating that on "June 8, 1976 a hearing on Petition for Modification of Decree and Petition to return child held sub curia pending further evaluation by the court...)". [228]

Malcomb contends that because the June 23, 1976 letter had a note by Respondent asking Malcomb to call him (Respondent), he attempted to contact Respondent but he was not able to. [229] He waited several days after the July 20, 1976 hearing date, but didn't hear from Respondent. He attempted to call him but was not able to reach him so he called Merle and asked her if she had heard anything about the decision. Merle said "Of course, don't you talk to your attorney? The judge gave me custody of Heather and you keep Kirsten and you pay me Twenty-five Dollars ($25.00) a week support" (meaning for Heather). Malcomb also called Merle's attorney (William Hammond, Esq.) (Hammond) "because I wanted to get it from a totally credible source." [230]

On July 27, 1976, Malcomb and Kathleen saw Respondent at a meeting of FUER at a church in Baltimore and he contends Respondent said:

> Oh, Mr. Malcomb, I have been meaning to call you, that I am still working on the case. And I said, Working on it? I thought it had been settled? He said, Settled? Nothing is ever settled. It is still up in the air. It is touch and go. I have been meeting with the Judge and trying to get it worked up. You know, Judges are very reluctant to divide custody of children. [231]

Malcomb contends he was confused and so the next day (July 28, 1976), he called Judge McDaniel's office to talk to the judge's secretary (to ascertain if a decision had been rendered). Actually, the judge answered and although he was reluctant to talk with Malcomb, Malcomb explained the situation and asked one question, "did you make this decision on the 20th of July and was this your decision." The judge told Malcomb "yes." The next day, Malcomb called Respondent who told Malcomb he had talked to Judge McDaniel that day (July 29, 1976) and the judge told Respondent that he was ready to sign an order giving Malcomb custody of one daughter and Merle custody of the other" if I was willing to pay Twenty-five Dollars ($25.00) a week support." Malcomb told Respondent he (Malcomb) had already agreed to that "as he (Respondent) knew" whereupon Respondent became very agitated and angry. Malcomb was finally able to calm Respondent down and after he asked Respondent what to do, Respondent said he felt Twenty-five Dollars ($25.00) was outrageous and we ought to request another full scale hearing to reduce support because of Merle's earning capacity. When Malcomb asked Respondent why Respondent hadn't contacted Malcomb about the outcome of the case, Respondent became very belligerent and said "I never did like you, you little bastard... you are just trying to get out of paying my fee." He threatened suit and slammed down the phone.

It is undisputed that Malcomb was quite angry and wrote Respondent a July 29,1976 letter pointing out that since Respondent knew full well that the judge's ruling [Kirsten to Malcomb; Heather to Merle; Twenty-five Dollars ($25.00) per week child support for Heather to be paid by Malcomb] "was the precise arrangement that I had been trying to work out for almost a year...you knew...I was willing to share the custody with Merle...I only went to court when she tried to take both of the children." Malcomb further accused Respondent of a contemptible and brazen attempt to string him along after Judge McDaniel had made his decision on July 20, 1976 and saw no reason to continue "our relationship." He informed Respondent that since he had paid Respondent "Your fee of $1,000.00 (which you quoted to me on the phone and insisted be paid before the June 8 hearing)" he saw no reason to honor the "further retainer" of $650.00.[233]

It is further undisputed that the very next day (July 30, 1976) a letter was sent by Respondent to Judge McDaniel enclosing a copy of a proposed Order endorsed "approved as to form." He explained that the reason for his "slight delay" was to discuss with Malcomb the support provision ("to permit him to reflect" since Respondent found the "fact situation" quite equivocal as to whether Malcomb had to make any payment for support) and to have Malcomb's decision in writing.

Respondent told the judge he understood Malcomb called him (the judge) and suspected he said a number of "derrogatory" (sic) things about Respondent. He then stated that Malcomb "has his own highly personal reason for wishing to have this order signed in haste and which I do not wish to discuss further."[234]

It is Malcomb's contention that there was no "discussion" as mentioned in Respondent's July 30, 1976 letter (except for Respondent's mentioning the Twenty-five Dollars ($25.00); and as to Respondent's statement that he"was taking the time to transmit to him and receive back a communication," Malcomb testified there were no communications at all.

The following is undisputed, namely, that Respondent then sent Malcomb an August 3, 1976 letter stating that although Malcomb was willing to pay Twenty-five Dollars ($25.00) per week for Heather's support, Respondent felt the requirement to do so to be "entirely unreasonable and unfair" [because of Merle's earning capacity of around Ten Thousand Dollars ($10,000.00) and her husband's salary]. He asked Malcomb to confirm in writing his acceptance of Judge McDaniel's "proffered ruling."[235] Two days later, he sent his client, Malcomb, an August 5, 1976 letter stating that the custody case was concluded "tenuously" (and "custody is always subject to the further jurisdiction of the court") because he (Respondent)was highly surprised that the court awarded Malcomb custody of one child because of evidence

of homosexuality and recent "gay" pornography photos and Malcomb "having been nude in the bathtub with this child." (However, Judge MacDaniel did not seem to view these matters as seriously as Respondent. The judge said "There is nothing that the mother of this child proved against the father that in my opinion makes the father an unfit person. She brought out a homosexual situation that happened prior to the time of the marriage and some pictures that were looked at afterwards, but there is no concrete evidence of anything that developed into a problem with these children."[236]) Respondent warned Malcomb the custody award of one child had to be "protected very carefully" and therefore his bill for "further proceedings" was for doing just this including the matter of child support." He said he did "not believe that $650.00 is an 'excess' (sic) charge for an attorney to make in seeking to avoid liability of his client for $13,000 payment"[237] and then warned Malcomb not to write any "further neurotic letters to the judge unless you wish to endanger your award of custody."[238]

Malcomb's contention was that in the June 8, 1976 custody hearing before Judge MacDaniel, Merle had raised fully the matter of homosexuality. He acknowledged such activity but testified it occurred before his marriage to Merle (in 1962). He denied recent "gay porno" photos stating he "apparently had gotten on a mailing list" and received several (postage stamp sized pictures) over a period of several weeks.[239] As has been seen, it was Respondent - and not Judge MacDaniel - who viewed these matters so seriously. One wonders why Respondent made these threats upon his client and why Respondent felt so threatened.

The following matters are undisputed, namely, that Malcomb had already paid Respondent One Thousand Dollars ($1,000.00) plus Fifty Dollars ($50.00) on the Six Hundred Fifty Dollar ($650.00) bill but had refused to pay the remaining Six Hundred Dollars ($600.00). Respondent then sent Malcomb on August 26, 1976 bill for One Thousand Eight Hundred Fifty Dollars ($1,850.00) listing a "previous balance" of Six Hundred Dollars ($600.00) plus another One Thousand Dollars ($1,000.00) for "Additional final fee based on successful result."[240] There was no conversation nor discussion between Malcomb and Respondent before Respondent sent the latter bill and Malcomb did not pay it. Respondent next sued Malcomb for One Thousand Eight Hundred Fifty Dollars ($1,850.00) in the Towson District Court on October 4, 1976 asking for summary judgment. He filed an Affidavit that "there is justly due and owing by the defendant to the plaintiff the sum of $1,850.00" and attached the August 26, 1976 bill.[241] Respondent then sent Malcomb another bill dated October 29,1976 this time for Two Thousand Two Hundred Fifty Dollars ($2,250.00). He listed One Thousand Two Hundred Fifty Dollars ($1,250.00) for "additional final fee based on successful result" and then added another One Thousand Dollars ($1,000.00) for "Re-analyzation of file, further additional fee based on time expended."[242] At no time, did Respondent discuss the additional One Thousand Dollars ($1,000.00) with Malcomb nor did Respondent discuss the additional One Thousand Dollars ($1,000.00) with Malcomb nor did Respondent advise Malcomb of the basis for the One Thousand Dollars ($1,000.00). Malcomb did not pay. Respondent then sent Malcomb another bill dated February 11, 1977 this time for

Two Thousand Eight Hundred Fifty Dollars ($2,850.00). It was a "Revised and Corrected Bill" which added Six Hundred Dollars ($600.00) ("previous balance").[243] Malcomb did not pay. Five days later (February 16, 1977), Respondent filed an Amended Statement of Claim for Four Thousand Two Hundred Sixty-two Dollars ($4,262.00) alleging an "implied contract, to pay reasonable charges for legal services rendered, and such services were rendered according to the attached plaintiff's Statement of Claim Exhibit 1."[244] This Exhibit consisted of five handwritten pages of alleged work plus the alleged time for the various alleged items of work (it also includes the previous billings).[245] [Although Respondent charged Malcomb for two trial "at $950.00 per day" it is undisputed that there was only one trial day]. Respondent then sent Malcomb a March 21, 1977 bill for Four Thousand Two Hundred Sixty-two Dollars ($4,262.00) marked "Corrected Bill - Based on "File Analysis" done in January, 1977." In April and May, 1977, Respondent sent "Balance Now Due" bills of Four Thousand Two Hundred Sixty-two Dollars ($4,262.00) to Malcomb.[246] Malcomb did not pay.

Respondent's contention was that the One Thousand Dollars ($1,000) paid by Malcomb was only a retainer and that when Malcomb was awarded custody of one child, Respondent sent him a bill for a "modest fee which was in keeping with my agreement with him, which was, that the prior payment was a retainer fee and that the total cumulative payment would be determined at a later date."[247] As to the "Paid in Full" bill

issued to Malcomb by his (Respondent's) bookkeeper, Respondent testified that she had "just about full independence;" that "he did not supervise the books;" that he had "difficulties about the wording, of the bills around the time" he was representing Malcomb; that told her she must be careful. Thus he contended that she would use "Paid in Full" for her own "personal convenience" to refer to <u>any</u> bill with a flat fee or retainer. He contended that Malcomb initially wrote asking how much would Respondent require in the way of a retainer and he billed him first stating "Further Retainer" of One Thousand Dollars ($1,000.00).

As to the various fee demands [from the Six Hundred Fifty Dollars ($650.00) to Four Thousand Two Hundred Sixty-two Dollars ($4,262.00], Respondent claims that the One Thousand Two Hundred Fifty Dollar ($1,250.00) bill was based on the "successful result" of the Malcomb case; the One Thousand Eight Hundred Fifty Dollar ($1,850.00) was Respondent's "total additional claim"; then "upon review of his file, however, Respondent realized that his initial billings did not reflect the value of the actual work performed. Having decided to sue on a <u>quantum meruit</u> basis, he revised the estimated value ...upward by $1,000.00;" the "third additional bill" was for a "reanalyzation of file, further additional based on time expended resulting in total additional claim of $2,250.00;" then,

in preparation for the District Court trial (by then Respondent had sued Malcomb), Respondent estimated he had done 36.8 hours worth of work (exclusive of trial time) which he multiplied by $90.00 per hour and added his standard fee for two days [Nine Hundred Fifty Dollars ($950.00) per day] and arrived at his figure of Four Thousand Two Hundred Sixty-two Dollars ($4,262.00).[254] At that, Respondent feels he "undervalued" his services.[255]

Respondent put on his wife who testified that Respondent had a lot of telephone conversations with his clients[256] and she heard him invariably talk about retainers.[257] It was his habit.[257A] (However, he sometimes charges "flat fees" in custody cases).

I find by clear and convincing evidence that Respondent agreed with Malcomb to represent Malcomb for One Thousand Dollars ($1,000.00) and no more and that the agreed One Thousand Dollars ($1,000.00) was not a retainer. The evidence is overwhelming. Respondent's own note to his own file "made at the time of the initial agreement by Respondent in December, 1975"[258] states "Fee $1,000.00" and under that "retainer" and under that "$500.00 down " and under that "rest of it in a month or so."[259] Although Respondent tries to minimize his own note[by terming it "unpunctuated"and by calling Bar Counsels interpretation of it "subjective"],this note coincides with Malcomb's version entirely (infra at 49). Moreover, when Respondent advised Malcomb of the date for trial, Respondent wanted the balance of his fee "($500.00 balance)" to be "paid before the trial."[260] He cannot

blame this writing on his secretary because the request for the "$500.00 balance" was his own dictation with his own initials ("L.K."). Again this coincides exactly with the testimony of Malcomb. Respondent's February 18, 1976 bill to Malcomb indicates "Balance Now Due...$500.00" [261] and his March 18, 1976 bill also indicates "Prior Balance $500.00 Paid February 11, 1976 $50.00 Balance $450.00)."

Malcomb's testimony was straightforward and consistent whereas Respondent's was variously evasive, inconsistent and misleading. The escalation of fees by Respondent was incredible. He was quick to charge Malcomb an additional Six Hundred Fifty Dollar ($650.00) fee two weeks after the June 8, 1976 hearing but - when Malcomb would not pay it, he increased his bill to One Thousand Two Hundred Fifty Dollars ($1,250.00); then One Thousand Eight Hundred Fifty Dollars ($1,850.00); then Two Thousand Two Hundred Fifty Dollars ($2,250.00); then Two Thousand Eight Hundred Fifty Dollars ($2,850.00) and finally Four Thousand Two Hundred Sixty-two Dollars ($4,262.00).

His excuses were farcical. He sued Malcomb in District Court and filed an Affidavit certifying that One Thousand Eight Hundred Fifty Dollars ($1,850.00) was the sum owned by Malcomb. [262] Yet he later sent a higher bill for Two Thousand Two Hundred Fifty Dollars ($2,250.00) claiming "re-analyzation of file." One would assume that when an experienced attorney of thirty years of practice sues his client for a fee that the attorney

would at least know how to sue for the right amount. Respondent claims he did not sue too many of his clients so the normal thing for him to have done would have been to analyze his file carefully before suit and then insert the proper amount. However, despite the fact that his previous affidavit certified that the sum for which he sued was"justly due and owing", he then further amended it up to Four Thousand Two Hundred Sixty-two Dollars ($,262.00).

When Respondent sued Malcomb for the Four Thousand Two Hundred Sixty-two Dollars ($4,262.00), he purported to inform the court of the basis for that ($4,262.00) figure by attaching a "File Analysis." This analysis listed, inter alia, "two trial days at $950.00 per day - $1,900.00."[263] However, at the District Court, when Respondent saw that Malcomb's attorney had produced the attorney (Hammond) who had opposed him (Respondent) at the trial in question (on June 8, 1976), as a potential witness, Respondent then admitted the trial took only one day.[264] (Malcomb testified that although Respondent listed a number of conferences, there was only one and Respondent's updated entries did not agree with his records and "I felt he was billing me...for other work that he didn't do.")[265] Respondent's testimony about his "work" is spotty and vague.[266]

It is undisputed that Respondent never discussed any of his escalating bills with Malcomb beginning with the Six Hundred Fifty Dollar ($650.00) bill. He simply sent them to

Malcomb. As to Respondent's August 26, 1976 bill of One Thousand Two Hundred Fifty Dollars ($1,250.00) ("Additional final fee based on successful result,")[267] if the July 20,1976 conference (at 2:00 P.M.)[267A] with Judge MacDaniel left matters so up in the air as Respondent contended ("subject to all sorts of wavering winds of change...open at that time, was the question of whether Malcomb should pay support, it was still open to contest")[268], why would Respondent charge Malcomb an additional fee for "successful result?" According to Respondent, he felt that the July 20, 1976 decision reached by Judge MacDaniel (requiring Malcomb to pay Twenty-five Dollars ($25.00) per week as support for Heather) was "unreasonable and unfair" and felt it would be "preferable to have a formal hearing.[269] Obviously, in Respondent's mind, this could not be called a "successful result" under such unfair circumstances even if Malcomb did retain Kirsten (whom he had before Respondent came to represent him).

Respondent further attempted to justify the Six Hundred Fifty Dollar ($650.00) fee which he said was not excessive when the aritmetic of it was considered (meaning Respondent's theory of a total dollar saving of $13,000.00[270] to Malcomb). However, this attitude was at best a naive and forlorn appeal to (by then) a totally disenchanged client and at worst a crude and dishonest effort to bulldoze Malcomb into submission. (The only way Malcomb could save $13,000.00 was to pay <u>nothing</u> for the support

of Heather - something he never wanted to do. He was perfectly content to pay this weekly sum for his child's support (as he had been doing/before he consulted Respondent) as he told Respondent on a number of occasions. Respondent was aware of this. Despite Merle's earning capacity [she was not then employed] and marriage, it was decidedly unrealistic to expect any court to not require[271] a father [earning near $22,000.00 per year - as per Malcomb's answer three to Merle's interrogatory - as prepared by Respondent] to pay something for the support of his child..

If the One Thousand Two Hundred Fifty Dollar ($1,250.00) bill was extortionate, the succeeding bills were even more so. There was no pretense at justification - simply a bald transmittal of ever-increasing dollar figures. No warning was given Malcomb; no conferences held; no attempt to itemize was made (except for the last bill in excess of Four Thousand Dollars ($4,000.00) - which contained a major "error"). There is no evidence from Respondent whatever as to guidelines or standards for future bills except Respondent's testimony that "the total cumulative[272] payment be determined at a future date." Malcomb was totally at Respondent's mercy. Respondent's mercy can be brutal and ruthless.

Respondent tried to exploit the fact that Malcomb accommodated Merle when she "backdated" their separation agreement one month.[273] This was mendacious conduct on Malcomb's part and Respondent excoriated Malcomb. However, by the same token,

Respondent too knew that the March 29, 1974 agreement was based upon a fraudulent date and he too did the same thing as Malcomb - He kept quiet.[274] His testimony concerning this inaction is evasive and unconvincing.[275] Apart from this, I find Malcomb's testimony truthful and credible. I believe him when he denied receiving any January 16, 1976 bill ("Further Retainer").[276] While I did not find Draper's denial (that he had received Respondent's June 23, 1976 bill) sufficient to overcome the presumption that he did receive it, that finding was based on the fact that the denial was by way of discovery in California and Draper was not then present in Maryland to be viewed and questioned. In addition, there was some suggestion that Draper was under the influence of a drug, compare U.S. v. Meerbeke,548 F. 2d 419 (1976) [defendant ingested opium in court - judge admonished for inaction]. Here Malcomb was in court, he underwent a blistering and humiliating cross-examination by Respondent and maintained his composure and credibility.

I find by clear and convincing evidence that one of the prime motivations for Respondent's unwarranted, improper and unfair billing was anger. He testified before the Inquiry Panel that "I will show that client (Malcomb) who had filed this complaint against me, he can't get away with that and then I increased the ad damnum,"[277] he testified he didn't like Malcomb (he is "universally disliked"[278]); and "probably that I was angry at him."[279] Anger should not be the basis for charging a fee to

a client (nor the basis for a lawsuit against a former client). (Respondent was also inconsistent as when he asserted that "fee disagreements"[280] should be settled by "impartial referees" and yet turns around and sues both Malcomb and Draper without any attempt at arbitration.[281])

In numerous respects, Respondent testified in an inconsistent and inaccurate manner. He called the Malcomb case a "junk case" but then realizing the danger of alluding to a custody case involving young children that way [to say nothing of charging One Thousand Dollars ($1,000.00) for a "junk case], he quickly denied it was a junk case; he testified that one of the children testified as to the so-called nude bathing incident in court but this was not so and, in fact, the children were not even in court;[282] he told Malcomb the decision of Judge MacDaniel[283] was "entirely unreasonable and unfair" and suggested there should be a formal hearing as to child support but he told Judge MacDaniel (the judge's) that his decision was "entirely correct... aside from the support question which is, however, a relatively minor matter in the overall case, and, of course, a matter to which gentlemen may honestly differ;[284] he told Judge MacDaniel (by letter dated July 30, 1976) that the reason for his "slight delay" (in not sending Judge MacDaniel the proposed order) was "in order to have (Malcomb's) decision in writing, I was taking the time to transmit to him and receive back the communications indicating he agreed with the support provision"[285] whereas his

letter to Malcomb asking for the written confirmation is dated later[286] on August 3, 1976; and asserted that he had "purposely refrained from claiming that privilege (Fifth Amendment)...in his deposition"[287] when he did so claim it as to his deposition ("I received a notice of deposition...and on the basis of Spevack v. Klein...I refused to be sworn...on the basis of the Fifth Amendment."[288]

Conclusions of Law

1-102(A)(4)

> A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation

I find the following by clear and convincing evidence: that Respondent represented to Malcomb that his total fee for his representation in the custody case would be One Thousand Dollars ($1,000.00) and no more but that in violation of his agreement, he charged(or attempted to charge) Malcomb fees over the agreed upon amount; that Respondent made a wilful misrepresentation to Malcomb as to his (Respondent's) fee; that Respondent maliciously and improperly escalated fee charges to Malcomb without any basis, without any agreement, without any warning; and without the escalated charges bearing any relationship to the amount of work done. Thus he has violated the above Disciplinary Rule.

As to Respondent's doing nothing to either advise Malcomb or the court of Malcomb's knowing acquiescence in Merle's backdating of their separation agreement, I am not convinced by clear and convincing evidence that Respondent furthered a fraud on the court.

1-102(A)(5)

A lawyer shall not engage in conduct that prejudicial to the administration of justice.

I find by clear and convincing evidence that Respondent did improperly and consciously attempt to obtain legal fees from Malcomb; and did utilize the court system to knowingly and improperly attempt to obtain legal fees from Malcomb. Therefore, he has violated the above Disciplinary Rule since such condition is clearly prejudicial to the administration of justice. Respondent's conduct is inimical to justice.

1-102(A)(6)

A lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law.

I find by clear and convincing evidence that Respondent violated the above Disciplinary Rule by improperly attempting to obtain legal fees from Malcomb and by utilizing the court system knowingly and improperly to obtain unwarranted legal fees from Malcomb.

1-102(A)(1)

A lawyer shall not violate a Disciplinary Rule.

Because I have found by clear and convincing evidence that Respondent has violated above first three Disciplinary Rules, I find by clear and convincing evidence that Respondent has violated Disciplinary Rule 1-102(A)(1).

Issue Two: Did Respondent violate any Disciplinary Rules by misrepresenting to Malcomb that his case was not yet resolved in the judge's mind (and could not have been) until the August 9, 1976 decree was signed and that he (Respondent) was working on the case (from July 20, 1976 on) when in fact, the judge's ruling was made on July 20, 1976, and the only matter remaining was the drafting and approval of the court-directed order; and Respondent was not working on Malcomb's case but rather trying to give the appearance of work in order to exact improper fees from Malcomb?

Findings of Fact

The facts as found in Issue One (infra at 48-67) are also found as to this Issue.

Judge McDaniel testified that he did "recall the case" and that the hearing date (as reflected from the file) was June 8, 1976. "Hearing and testimony was taken." He made a decision "when the case was over, that day." (June 8, 1976). The decision was "in accordance with the Decree that ended up being signed" (the August 9, 1976 decree awarding Heather to Merle; Kirsten to Malcomb; and requiring Malcomb to pay Twenty-five Dollars ($25.00) per week as child support for Heather). He was requested by one of the attorneys to wait a period of time and allow the attorneys to come back and argue "or further discuss the case with me and I believe we even set a firm date...for them to come back. Whatever date that was I believe they did come in and I told them that, what my decision was, and told Mr. Hammond, I believe, to prepare a Decree, submit it to Mr. Kerpelman for approval as to form and then to the court and that I would sign it." He testified it was on July 20, 1976 and it was not

a hearing but "just a kind of argument." He testified that he did receive a call from Malcomb and at first, refused to talk to him until he was "informed that he (Malcomb) only wanted to know when I was going to make up my mind and I then did talk to him...and I told him that I had made it up and...I was only waiting for the attorneys to send in the Decree so I could sign it."[289] The judge testified that the reason he talked to Malcomb was "...his comment was that I hadn't made a decision and I felt if I told him the decision had been made, that maybe he would go to his attorney or the other one and get the Decree into me so I could sign it."[290]

He had no recollection at all as to the matter of support in the July 20, 1976 conference.[291] He testified that between July 20, 1976 and the time he received the Order to be signed, he"had no contacts with Respondent that he knew of."[292]

Hammond testified that at the half hour conference on July 20, 1976, Respondent was upset at Judge McDaniels indication that he was going to award child support for Heather; that Judge McDaniel asked me "to prepare an order commensurate with his decision;" that he did so and sent the proposed order to Respondent on July 22, 1976[293] for consent as to form ("if there are any questions, please so advise"); that Judge McDaniel was firm in his July 20, 1976 position [Heather to Merle; Kirsten to Malcomb; Twenty-five Dollars($25.00) child support for Heather] and "that was his decision whether Mr. Malcomb agreed to it or whether he didn't that was his decision;" that Respondent sent

him a "temporary order"[294] on July 1, 1976 which he (Hammond) refused to accept; and that from July 20, 1976 on (to the District Court case November 4, 1977),he had no other conversations with Respondent with regard to the case.[295]

It is Malcomb's contention that the judge had clearly made a decision on July 20, 1976 and that Respondent knew it but tried to convince Malcomb that the matter was still unresolved. He and his wife Kathleen testified that they met Respondent at a FUER meeting on July 27, 1976 and Respondent told him he "was still working on the case" and that it was not settled. Nothing is ever settled. It is still up in the air. It is touch and go. I have been meeting with the judge and trying to get it worked up. You know, judges are very reluctant to divide custody of children."[296] It was also Malcomb's contention that divided custody was very much what he (Malcomb) wanted; that he was perfectly content to pay weekly child support of Twenty-five Dollars ($25.00) for Heather; and that he had told this to Respondent repeatedly. Malcomb contended that when he discovered Respondent's brazen attempt to string him along, he terminated his relationship with Respondent.

It is Respondent's contention that the order was not effective until it was signed; that despite Malcomb's willingness to pay child support, he was trying to convince him (Malcomb) not to accept the prepared order as to child support because of Merle's earning capacity and her marriage; that there was no such

July 27, 1976 conversation with Malcomb at the FUER meeting; that despite Malcomb's having custody of Kirsten, this was not secure (because of Malcomb's past homosexuality); that he promptly informed Malcomb of the outcome of the July 20, 1976 hearing and that Malcomb considered the option (of contesting the award of support) for at least a week.[297]

I find by clear and convincing evidence that Respondent deliberately withheld from Malcomb the decision of Judge McDaniel on July 20, 1976; that he only submitted the proposed order to Judge McDaniel on July 30, 1976 when he realized that Malcomb had found out about Judge McDaniel's decision reached on July 20, 1976; and that he deliberately withheld the judge's decision in order to make it appear to Malcomb that he (Respondent) was still working on Malcomb's case in order to justify his "further" (and improper) fee.

Again, the evidence is overwhelming. I find as fact the following undisputed chronology of events:

1. June 8, 1976 - It is undisputed that there was a hearing on this date; and that the judge stated at the end that the attorneys should let the situation remain status quo (Heather to stay with Merle; Kirsten to stay with Malcomb); that the attorneys should return in two weeks and at that time, he would make a determination; that Malcomb should pay child support for Heather;[298] and that he had made his decision (Heather to Merle; Kirsten to Malcomb and Malcomb pay Twenty-five Dollars

$25.00) per week child support for Heather] on June 8, 1976 (see infra at 69).

2. June 23, 1976 - respondent bills Malcomb Six Hundred Fifty Dollars ($650.00) for "Further retainer."

3. July 1, 1976 - Respondent sends proposed Temporary Order to Hammond (Heather to temporarily remain in custody of Merle; Kirsten to temporarily remain in custody of Malcomb; support shall continue with payments to be made as heretofore).[299] (Malcomb had been paying $25.00 per week for Heather's support).

4. July 20, 1976 - Conference between Respondent, Hammond and Judge MacDaniel. The judge reaffirmed his previously reached decision and directed Hammond to prepare an order accordingly. He was firm despite Respondent's being upset about Malcomb being required to pay child support for Heather (see infra at 70).

5. July 22, 1976 (Thursday) - Hammond sent proposed order to Respondent and Respondent "probably" received it on July 23, 1976.[300]

6. July 22, 1976 - Malcomb called Merle and Hammond (see infra at 51) and ascertained that he (Malcomb) was to have custody of Kirsten and pay Twenty-five Dollars ($25.00) child support for Heather; and Merle was to have custody of Heather.

7. July 27, 1976 - Respondent tells Malcomb the case is still not settled; it is still up in the air; judges don't like divided custody, see infra at 71 (while this matter is disputed, I find as a fact that it occurred).

8. July 28, 1976 - Malcomb called Judge MacDaniel and ascertained same thing and also that the judge had made his decision on July 20, 1976.[301]

9. July 28, 1976 - Malcomb confronted Respondent with the above by telephone.

10. July 28, 1976 - Respondent wrote Hammond he'll return the order as soon as he has had the opportunity to go over one or two matters with Malcomb. 302

11. July 29, 1976 - Malcomb sent letter of termination to Respondent as result of Respondent's "brazen attempt to string me along after Judge McDaniel had made his decision on July 20th."

12. July 30, 1976 - Respondent sent proposed order to Judge McDaniel (and signed it).

13. August 3, 1976 - Respondent sent letter asking Malcomb to confirm in writing his consent to the child support requirement.

14. August 5, 1976 - Respondent wrote Malcomb that the custody case is concluded "tenuously."

15. August 9, 1976 - Judge McDaniel signed order.

Malcomb's version is entirely credible; Respondent's is not. It is that simple. If Respondent promptly informed Malcomb of the outcome of the July 20, 1976 hearing, as Respondent says, then why would Malcomb call Merle? Or Hammond? Or Judge McDaniel? Respondent offers no corroboration as to his "promptly" informing Malcomb whereas Judge McDaniel testified that Malcomb did phone him and what is more, his (Judge McDaniel's) version of the conversation is exactly the same as Malcomb's. 303

Aside from corroboration, why would Malcomb want to call these people if Respondent had really told him about the proposed order. The decision was exactly what Malcomb wanted!

As to Merle having custody of Heather and Malcomb having custody of Kirsten, Respondent knew that was what Malcomb wanted. In fact, Respondent had written Hammond on January 7, 1976, suggesting divided custody on behalf of Malcomb.[304] As to supporting Heather, Malcomb had been paying the weekly sum of Twenty-five Dollars ($25.00) for Heather's support even before he consulted Respondent and he told Respondent he was quite content to continue to do so (his income was as follows: 1971 - $16,003.30; 1972 - $15,224.03; 1973 - $21,052.41 and 1974 - $21,707.43).[305]

Respondent admits he probably received the proposed order from Hammond on July 23, 1976.[306] So he had it in his possession from July 23, 1976 to July 30, 1976 (when he mailed the agreed upon order to Judge McDaniel).[307] Even before he received the proposed order from Hammond, he knew Judge McDaniel's decision (having been informed of it at the July 20, 1976 conference). If he promptly advised Malcomb of that decision and if, as has been seen, the decision was precisely what Malcomb wanted, why would Malcomb write a letter of outrage to Respondent? Although Respondent claims Malcomb was trying to avoid paying the Six Hundred Fifty Dollar ($650.00) fee, I find conclusively that Malcomb was genuinely outraged and did not desire to bilk

Respondent out of his fee. Malcomb had paid the One Thousand Dollar ($1,000.00) fee set by Respondent in accordance with Respondent's direction but when Respondent sent a bill contrary to their agreement,[308] Malcomb balked and understandably so.

More to the point is that the actual decision was reached not on July 20, 1976 but on June 8, 1976. Judge McDaniel testified that he reached the decision on June 8, 1976, repeated it on July 20, 1976 and ultimately signed an order /the same decision[embodying] on August 9, 1976. While Respondent attempts to avoid the implications of this basic fact by a legal argument (that the decision did not become final until signed), that is beside the point. From a fact finding viewpoint, Malcomb's actions make sense, are consistent and are credible.

Respondent claims he not only promptly advised Malcomb to contest the oncoming child support order but requested that Malcomb consider this "option for at least a week before taking any action."[309] But as seen before, why should Malcomb contest something that he favored? More interesting is the fact that Respondent had to explain why he kept the proposed order received by him for this one week (from July 23, 1976 to July 30, 1976). Respondent had to explain away that week. Respondent's claim that Malcomb was pondering and considering the simple matter of whether or not to support his child is simply not credible.

I find Malcomb's behavior consistent. Respondent's behavior, however, is not. If, as Respondent contended, he truly

felt that Judge McDaniel's proposed order was so "unreasonable and unfair"[310] how does he explain the fact that from June 8, 1976 to August 9, 1976, he did absolutely nothing about it? He wrote no letters to Judge McDaniel(nor to Hammond), he filed no motions and asked for no hearings. There was absolutely no conduct on his part to evidence such displeasure with the support phase of the upcoming order. On the contrary, he wrote Judge McDaniel calling the support question "a relatively minor matter in the overall case"[311] and that gentlemen could differ. Even before the July 20, 1976 conference, the objective conduct of Respondent is consistent only with acquiescence in the support situation. Malcomb had been paying Twenty-five Dollars ($25.00) per week for Heather's support, and on July 1, 1976, Respondent sent to Hammond a proposed temporary order (prepared by Respondent) proposing child support "as heretofore."[312] Respondent tries to avoid the implications of his action by assertinga difference between temporary and permanent child support. Here again, this is beside the point. The question is what is the totality of the factual situation to a factfinder.

Respondent sent a Six Hundred Fifty Dollar ($650.00) bill for "further retainer" on June 23, 1976. The word "retainer" is significant. If future work really had to be done, then the Six Hundred Fifty Dollar ($650.00) bill would be justified at least in the sense of a fair bargain (work for money). But if

there was no work to be done, then the bill would be totally unjustified. I find that there remained no substantial work to be done after July 20, 1976 and if there were, none was ever performed by Respondent. I find further (all by clear and convincing evidence) that Respondent deliberately intended to give Malcomb the impression that he (Respondent) was obliged to perform work on Malcomb's case when, in actuality, there was no work to be performed.

Conclusions of Law

1-102(A)(4)

> A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

I conclude by clear and convincing evidence that Respondent deliberately misrepresented to Malcomb that there remained work to be done on his (Malcomb's) case and that he (Respondent) was actually engaged in performing such work, whereas, after July 20, 1976, there remained no work to be done and Respondent, in fact, performed no work and that this misrepresentation was made to justify an improper fee. I therefore find that he violated the above Disciplinary Rule.

1-102(A)(6)

> A lawyer shall not engage in any other conduct that adversely reflects on his fitness to prosecute.

I conclude by clear and convincing evidence that the aforesaid deliberate misrepresentations by Respondent

constitute clear conduct that adversely reflects on his fitness to practice law. In addition, Respondent deliberately misrepresented to Judge McDaniel in his July 30, 1976 letter that his delay in transmitting the proposed order was caused by his desire to have Malcomb's written agreement as to the child support provision (and to have Malcomb have enough time to be certain) whereas in fact Malcomb had not communicated his written agreement at the time Respondent sent the July 30, 1976 letter (nor after); and there was no need for Malcomb to so agree in writing since at all times Malcomb had agreed and Respondent knew it.

Issue Three: Did Respondent violate DR 2-110(A)(2) by improperly withholding Malcomb's papers and the decree after being discharged by Malcomb; and by continuing to deal with Judge McDaniel after he was discharged?

I find no clear and convincing evidence that Respondent violated this Disciplinary Rule.

Issue Four: Did Respondent violate DR 6-101(A)(2) by lack of adequate preparation in that he conducted no discovery, interviewed no witnesses before trial, called witnesses who were of little or no probative value, failed to call witnesses who were of probative value and generally displayed no knowledge of the facts surrounding the Malcomb case?

The facts as found in Issues One and Two (infra at 48 - 79) are also found as to this Issue.

Bar Counsel asserts that Malcomb "wanted" both children - meaning custody of both. I do not agree. While Malcomb may have wanted custody of both at an earlier time, his final and steady

decision was to obtain custody of Kirsten alone allowing Merle to have custody of Heather.

Findings of Fact

The trial in question took place on June 8, 1976. It arose as the result of Merle's filing of a petition to modify the March 29, 1974 decree (which granted custody of both children to Malcomb). Malcomb's then attorney (Bartholomee) filed Malcomb's answer to said petition and also filed written interrogatories upon Merle. She filed her answer and also filed written interrogatories upon Malcomb. By this time, Respondent had replaced Bartholomee. Respondent filed a petition for "Immediate Return of Child" (Heather) and obtained a Show Cause Order (December 17, 1975). He also filed answers to Merle's interrogatories (December 23, 1975). Respondent then issued a summons for witnesses (Malcomb's wife, Kathleen, Dr. Jane Mason, Sarah Fischer and Janet Slutter) together with subpoena duces tecum for Drs. G. P. Patton, Jane W. Mason, Harvey L. Saxton and Santiago Garza.

The trial took one day. Merle produced five witnesses and Respondent produced five also (including Merle as an adverse party). While Respondent filed no interrogatories, his predecessor (Bartholomee) did. Merle's answers provided the names of certain witnesses but Respondent never deposed nor interviewed them (except that he did summon Dr. Jane Mason,

one of the witnesses listed in Merle's answers to interrogatories).

Prior to trial, Respondent did have one "formal interview" with Malcomb[314] but he never interviewed any of Malcomb's witnesses until the day of trial. Nor did he depose anyone. This subjected him (Respondent) and his client to the same type of infirmities as mentioned previously (infra at 29-35).

Respondent did hire one Mary Slicher (private social worker) to investigate. Bar Counsel feels that Respondent failed to note the contents of her report as concerns Mr. and Mrs. Grabus which, Bar Counsel feels, adversely affected Malcomb. Yet paradoxically Bar Counsel downplays Ms. Slicher noting that Judge McDaniel did not allow her to testify as an expert ("not to her experience but just observations")nor "was her report admitted into evidence."

What Bar Counsel perceives as inadequacy may well be trial tactics. For this reason and for the reasons outlined infra at 29-33) , I do not find that Respondent violated DR-6-101(A)(2).

CHARACTER WITNESSES

Respondent produced twenty-one character witnesses (and a letter from a retired judge). For the most part, they seemed to be fine people.

The impact of some left a bit to be desired, however, as witness the case of Paul Hanson. This gentleman "started" FUER, was its President and is still Chairman of the Board. He testified that he "was proud of his association with Respondent

both personally and professionally."[315] He trusted Respondent completely.[316] When asked if he had ever referred to Respondent as "a sarcastic, irrational hyena who simply turns people off," he responded "No" and testified he would never say that about Respondent.[317] However, he was forced to admit that he had said so. He was confronted with a letter he had written dated July 9, 1977 to the Reverend Harry E. Shelley. In that letter, Mr. Hansen said "I am distressed at the way he talked to you and I admire your composure in the face of such irrational, loud-mouthed rudeness...Leonard's personality gets in his own way. If someone...simply disagrees with him, he takes it personally and turns from being a compassionate, helpful man and becomes a sarcastic, irrational hyena...He recently complained because I did not back him up in his confrontation with you. How could I? I was ashamed to be associated with him."[318]

When asked if he was telling the minister the truth or not telling him the truth, Mr. Hansen replied "Well its semi-truth."[319] In effect, Respondent produced a character witness who told semi-truths and then only when confronted with irrefutable evidence.[320]

Another somewhat infelicitous choice of Respondent was retired Judge Charles D. Harris. He testified he could "answer only in this case. As far as I can remember, I cannot recall you ever telling me anything that was untrue." But he also had found Respondent guilty of contempt.[321] As the result

of this disclosure, the file in question was obtained and it revealed an Order of Contempt setting out various acts of direct contempt by Respondent (on July 30, 1973, it was ordered that Respondent "is hereby adjudged guilty of direct contempt of this court."[322])

The file includes a transcript of statements by Judge Harris and Respondent on July 17, 1973 (outside the presence of the jury) and again on July 18, 1973 (after the criminal case was concluded[323]).

July 17, 1973

By Judge Harris At 3 - "I have sat on this Bench for almost twelve years and I have never had an attorney, an alleged officer of the court, behave so outrageously in the trial of a case as you have...Your argument to the jury was a dishonest and a patently dishonest argument.

By Respondent At 4 - "...terribly sorry...That was a failure of recollection."

By Judge Harris At 5 - "It was a completely dishonest thing for you to do and you must have known it was dishonest."

By Judge Harris At 8 - "I am going to cite you for contempt."

July 18, 1973

By Judge Harris At 29 - "dishonest and attempt to mislead the jury and deceive the jury and really pervert the truth."

The upshot of it was that Judge Harris and Respondent had a later discussion in which Respondent said the "understanding" was that if within six months "there had been no valid complaints of my (Respondent's) in-court conduct, then Judge Harris would

dismiss the proceedings;"[324] and on January 1, 1974, Judge Harris apparently relented and finally saw fit to rescind the Order of Contempt.[325]

The matter of character witnesses must be put in proper perspective. Respondent did produce, as I say, some very fine persons and they did hold him in high esteem. However, Respondent has been shown to have violated various Disciplinary Rules principally from his own utterances and by documentary data. The worth of character testimony must be balanced against the powerful impact of what Respondent himself has had to say about the events in question, the penumbral documents that illuminate clearly these events and the certainty of these events as ascertained by plain common sense.

Finally, as to pattern of conduct, it is true that there exists a decidedly similar pattern of conduct. In each case, two men (who barely knew each other - if at all) went to Respondent to represent them, in each case, the problem was that of custody; in each case, both claimed Respondent quoted them a One Thousand Dollar ($1,000.00) fee (not a retainer); in each case, the said Five Hundred Dollars ($500.00) would have to be sent as a retainer for him to start; in each case, Respondent told these clients the entire fee had to be paid before trial in each case, there was a trial where Respondent exhibited a

lack of familiarity with the facts; in each case, Respondent sent bills for additional final fees based on an implied verbal contract; in each case, the clients angrily charged Respondent with violating their fee agreement; and in each case, Respondent decided to sue his clients. The problem is that as to Draper, the evidence does not permit a finding by clear and convincing evidence that the agreement embraced a "flat fee." While there are highly persuasive factors indicating that it was, Respondent belatedly produced a bill which sounded in retainer and Draper did not testify in court that he never received it. The high standard that is required can not, therefore, be met. That being so, the pattern is thus skewed - to that extent.

CONCLUSION

The above Findings of Fact and Conclusions of Law are respectfully transmitted to the Court of Appeal pursuant to MR-BV 11(a).

MARSHALL A. LEVIN
JUDGE

February 19, 1980

FOOTNOTES *

1. Created by Maryland Rule of Procedure (MR) BV 2.a. on February 20, 1975.

2. MR BV 4 states that the AGC shall appoint, subject to the approval of the Court of Appeals, an attorney, as Bar Counsel of the discliplinary system (Bar Counsel is the "principal executive officer of the disciplinary system"). See Pleading 1.

3. Charges against an attorney shall be filed by the Bar Counsel acting on the direction of the Review Board (MR-BV 9.a.) on behalf of the AGC (MR-BV 9.b)

4. MR-BV 5.a ("a Review Board is...authorized and created") and d (consisting of fifteen attorneys not judges selected by the Board of Governors of the Maryland State Bar Association [the AGC appoints each attorney selected].

5. The procedure which leads to the filing of disciplinary charges against Maryland attorneys is as follows:

   a. Bar Counsel shall investigate all matters involving possible misconduct called to his attention whether by complaint or otherwise - MR-BV 4.b.(i).

   b. He prosecutes all disciplinary cases - MR.BV 4. b.(ii).

   c. He may dismiss complaints without merit or misconduct which don't warrant discipline (subject to approval of the Chairman of the "Inquiry Committee") - MR-BV 6.a.2.

   d. He shall refer a complaint (unless dismissed by him) to an Inquiry Panel and give notice to the attorney against whom the complaint is made - MR-BV 6.a.4.

   e. The attorney is afforded an opportunity to examine and controvert the complaint and to be represented by counsel before the Inquiry Panel MR-BV 6.d.1. The Inquiry Panel shall conduct a hearing and shall recommend, inter alia that "charges be filed against the attorney" MR-BV 6.d. 4.(a)(iii) together with its recommendations, the reasons therefor and any evidence taken in the proceedings. MR-BV 6d.4(b). Bar Counsel shall transmit to the Review Board and the attorney, copies of the recommendations, reports and, whenever practical, copies of the evidence. MR-BV 6d.4(b).

* The words "pleading" and "document" are used interchangeably in these footnotes.

f. The Review Board shall review each transmitted case pursuant to MR-BV 6d. and may approve, inter alia, the recommendation. It shall state its reasons; and the Bar Counsel sends to the attorney and the complainant written notice of its decision. MR-BV 7.b.

g. As in footnote 3, charges against the attorney shall be filed by Bar Counsel, acting at the direction of the Review Board and on behalf of the AGC with the Court of Appeals.

6. Defined as an act or omission by an attorney, individually or in concert with any other person or persons which violates the Disciplinary Rules of the Code of Professional Responsibility, is adopted by Rule 1230. MR-BV 1.j.

7. The charges against Jarvis were withdrawn by Bar Counsel on June 19, 1979. Bar Counsel had summoned Jarvis (Pleading 71G), Myerberg called Jarvis earlier that week and again on June 18, 1979 but Jarvis refused to comply with the summons saying "there was no way he was going to show up to testify for a variety of personal reasons," and would leave town if the court signed a bench warrant. Nor was Jarvis' mother present even though she had been summoned. McDonough stated that Myerberg felt Jarvis was "lying to us." T. June 19, 1979 at 10-11. This court stated "at an appropriate time, this court will attempt to find out details sufficiently to determine what to do about this." Id at 15. On October 19, 1979, this court informed Bar Counsel and Respondent that "under no circumstances would the Jarvis complaint be presented before me." This court stated that it intended to find out why Jarvis did not appear when summoned but would defer producing him in court until after this court's opinion was transmitted to the Court of Appeals. See Pleading 99 and also Pleading 98. Previously, this court had directed Bar Counsel to investigate all facets of Jarvis's refusal to testify and if necessary, refer it to the State's Attorney's Office if there were any problems "of a criminal nature." T. June 19,1979 at 17.

8. Pleading 2. The Court of Appeals by order may direct that the charges be transmitted to and heard in any court and shall designate the judge or judges to hear the charges. MR-BV 9.b.

9. Respondent's Motion for Proctive (sic) Order paragraph 6-Pleading 9.

10. On March 20, 1979, Bar Counsel had filed a Notice of Deposition Duces Tecum to take Respondent's deposition

on April 5, 1979. Pleading 6.

11. On March 20, 1979, Bar Counsel had filed a Request for Admission of Facts and Genuineness of Documents. Pleading 3.

12. On March 20, 1979, Bar Counsel had filed written Interrogatories on Respondent. Pleading 5.

13. For example, T. July 13, 1979, at ZI

14. To prevent taking of his deposition and to declare that Interrogatories not be answered "at this time." Pleading 10.

15. Pleading 11.

16. Asserting that MR-BV 10 provides that Chapter 400 governs depositions and discovery procedure; that Inquiry Panel procedures are analogous to Grand Jury presentments (informal accusation of crime) and hence Inquiry Panel procedure is not to prepare for trial but to determine whether probable cause exists to present charges to the Court of Appeals; that discovery is to prepare for trial; and that Respondent had not shown good cause. Pleading 14.

17. Because Respondent's motions were not accompanied by a statement of points and authorities and were bad in form and insufficient in substance. Pleading 12.

18. On May 2, 1979 (see T. May 2, 1979).

19. Respondent refused to approve the proposed Order because he said it should read "shall respond" and not "answer." Accordingly, this court added "or otherwise respond to" after "answer."

20. See Order dated April 16, 1979. Pleading 31.

21. T. April 5, 1979 at 14; T. May 2, 1979 at 40-51.

22. There were three complainants and the Interrogatories as to each numbered thirty or less. Order dated May 2, 1979. Pleading 43.

23. On April 12, 1979, Respondent moved to strike Interrogatories 3 and 6 because they referred to "emotional disability or illness. Pleading 22. This motion was granted. (Respondent also wanted Bar Counsel to be cited for contempt and the proceedings dismissed. This part of Respondent's motion was denied).

24. T. May 23, 1979 at 66-126.

25. Pleading 69.

26. T. April 5, 1979 at 15-27.

27. He alleged that an unknown judge of the Eighth Judicial Circuit stated he should have been disbarred long ago but that the Chief Judge of the Supreme Bench of Baltimore City deigned not to reply to his query as to the identity of that judge.

28. The Court of Appeals noted Respondent's statement at the April 5, 1979 hearing that "Judge Levin is very precise about obeying propriety and the appearance of propriety." Further, after I said I knew nothing upon which to base my disqualification, Respondent said "he would have been so entirely uncomfortable in implying to impugn the court's impartiality on the record that (Respondent) wouldn't wish to do it at the time of the conference." T. April 5, 1979, at 9. See Pleading 24 and MR-BV 9.e.1 (action on Motion in discretion of Court of Appeals.

29. Pleading 19.

30. On May 2, 1979 (see T. May 2, 1979).

31. He contended the Petition was not sufficient to tell him what acts were violations of a particular Disciplinary Rule, inter alia. The eleven page demurrer is Pleading 18.

32. On May 15, 1979 (See T. May 15, 1979 at 29-156).

33. Pleading 60.

34. He said the charges were not related and that bias would be aroused by linking. Pleading 17.

35. T. May 2, 1979 at 22-30; T. May 15, 1979 at 4-12 and 17-25.

36. Pleading 61.

37. Pleading 16.

38. Both Respondent and one of the two Assistant Bar Counsel representing the AGC against Respondent (Henry J. Myerberg, Esq.) are of the same religion. "Myerberg joined Bar Counsel after Respondent was charged. Respondent called Myerberg a 'show Jew'."

39. "Levied without the consent of the Legislature in violation of Article XIV, Maryland Declaration of Rights" (Pleading 16, Twenty-third Motion).

40. But formal charges of misconduct do not exist against an attorney until a complaint is docketed in the Court of Appeals. AGC v. McBurney, 282 Md. 116 (1978).

41. Pleading 73.

42. On May 10, 1979 - Pleading 35.

43. Spevack v. Klein, 385 U.S. 511 (1967).

44. Pleading 34. On May 14, 1979, the AGC filed a Supplemental Answer. Pleading 42.

45. Pleading 36.

45A. Pleading 37.

46. Pleading 38.

47. Pleading 39.

48. Pleading 40.

49. Pleading 64.

50. T. May 23, 1979 at 137-164.

51. Id at 185-187.

52. Id.

53. Stewart was filed on May 31, 1979 and was attached to Bar Counsel's Further Answer. See Pleading 68.

54. He believed there were eight on the Board of Governors from Baltimore City and that one was a solo practitioner.

54A. Fox also presented to the Rev. Bd. the cases against Resp.

55. T. June 1, 1979 at 68. In addition, Respondent sought information about applicants for the position of Bar Counsel, investigators, paralegals and part-time law clerks. In order to avoid problems of confidentiality and yet comply with Respondent's request (as well as to preserve for appellate review) the applications were reviewed, a list made (now identified as Courts Exhibit 6) and copies given to Respondent and Bar Counsel.

56. On June 13, 1979.

57. Dorsey's Motion, Pleading 76; Show Cause Order dated June 20, 1979, Pleading 80; Respondent filed Answer, Pleading 82.

58. Bregel's Motion, Pleading 79; Show Cause Order dated June 20, 1979; Pleading 78; Respondent filed Answer, Pleading 81.

59. Pleading 1.

60. See Note 7.

61. Pleading 85.

62. Pleading 25.

63. There was no deposition attached, however.

64. T. May 23, 1979 at 126-132.

65. On May 23, 1979. Pleading 63.

66. Pleading 59.

67. T. May 23, 1979 at 9.

68. Id. at 10.

69. Pleading 62. Otherwise anyone could compel disqualification by merely calling a judge's father-in-law as a witness.

70. Pleading 57.

71. Pleading 3 at 1-8 inclusive.

72. T. May 23, 1979 at 23-26.

73. T. May 15, 1979 at 26-100.

74. Id. at 34, 39-40, 50

75. Id. at 34.

76. Petitioner's Exhibit 36.

77. Petitioner's Exhibit 39.

78. Id.

79. T. June 19, 1975 at 95-120.

80. T. May 15, 1976 at 34.

81. Id. at 142

82. Id.

83. Id. at 158.

84. Id. at 159.

85. Pleading 62.

86. T. May 23, 1979 at 28-43. (See Pleading 58.)

87. Id. at 55-63.

88. A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

89. A lawyer shall not engage in conduct that is prejudicial to the administration of justice?

90. A lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law.

91. A lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

92. A lawyer shall not handle a legal matter without preparation adequate in the circumstances.

93. In his representation of a client, a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

94. A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

95. See Note 88.

96. See Note 89.

97. See Note 90.

98. See Note 91.

99. See Note 92.

100. Respondent's Exhibit 30 (Bill of Complaint of Marlene, paragraph 3; Answer of Draper, admitting same); Petitioner's Exhibit 4.

101. Id. (testimony before Examiner and Master on December 13, 1974 at 3).

102. Id. (Bill of Complaint of Marlene).

103. Id., Answer of Draper.

104. Id. Letter dated December 4, 1974 from Draper's then attorney (Martin A. Wolff, Esq.).

105. Petitioner's Exhibit 50.

106. T. June 18, 1979 at 109.

107. Id., at 110

108. Id.

109. Petitioner's Exhibit 9; T. June 18, 1979 at 113.

110. Petitioner's Exhibit 8; T. June 18, 1979 at 112 and 114.

111. Respondent's Exhibit 30 (Petition for Modification filed May 14, 1976).

112. The petition claimed Marlene was unfit (promiscuous) and "subjects the child to a bad environment." Petitioner's Exhibit 51.

113. Petitioner's Exhibit 11.

114. Petitioner's Exhibit 12.

115. T. June 18, 1979 at 117.

116. Petitioner's Exhibit 13.

117. T. June 18, 1979 at 118.

118. T. June 18, 1979 at 128.

119. Respondent's Exhibit 30 (Hearing on Petition to Modify Decree - March 27, 1977 at 199). The Court of Special Appeals said that Draper and three other men "spirited away the child." Draper v. Draper, 39 Md. App. 73, (1978).

120. Id. Document 24.

120A. Respondent feels there may have been a "time lag" between dictating the petition and being transcribed by Respondent's secretary. T. July 13, 1979 at 60. However, he never advised the court of the child snatch when he actually filed the Petition.

121. Petitioner's Exhibit 49.

122. Respondent's Exhibit 30 (Document 102).

123. Petitioner's Exhibit 14.

124. Petitioner's Exhibit 6.

125. Petitioner's Exhibit 17.

126. Respondent's Exhibit 30 (See decree).

127. Petitioner's Exhibit 54.

128. T. July 13, 1979 at 63.

128A. Id. at 63 (third line from bottom).

129. Respondent's Memorandum of Law at 3.

130. Barbara Green.

131. Respondent's Memorandum of Law at 3.

131A. Respondent's Exhibit 35.

131B. Respondent's Exhibit 25.

131C. Respondent's Memorandum of Law at 7 (line one)

132. Id. at 6-7.

132A. Respondent's untitled Memorandum believed to be a "Memorandum of Reply" (hereafter called "Memorandum of Reply") filed January 2, 1980 at 4 (thirteen lines from top of page 4).

133. Document 90A filed September 10, 1979 at 4 (Deposition of Draper - August 15, 1979 - taken Los Angeles, California).

134. Petitioner's Exhibit 6; T. June 18, 1979 at 121-22.

135. T. April 5, 1979 at 6 and see T. July 11, 1979 at 3-4.

136. T. June 18, 1979 at 108 and 158.

137. Ethical Consideration 2-19 states that: "As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes." Ethical Considerations are not mandatory but they do give some guidance in the interpretation of the Disciplinary Rules.

138. Note 133, supra.

139. Note 125, supra.

140. Letter attached to Petitioner's Exhibit 7.

141. Id.

142. Respondent's Exhibit 30 (Document 105; Petitioner's Exhibit 5.)

143. Id. (Document 108); Petitioner's Exhibit 5.

144. T. June 18, 1979 at 126.

145. Petitioner's Exhibit 15.

146. Respondent's Memorandum at 6.

147. T. June 18, 1979 at 109.

148. T. July 13, 1979 at 61.

to

149. Due/Judge Hopper's carrying over a jury trial. Court's secretary told Respondent another judge might be available in the afternoon but unfortunately, none was. Respondent's Exhibit 30 (letter January 10, 1977 to Respondent from Juanita Dulaney, secretary to Judge Hopper). Respondent, however, contended in his Answer (Pleading 32)to Bar Counsel's Request for Admission (Pleading 3) he came to Annapolis under the unequivocal direction of the judge "who indicated that the case would definitely be tried." [Answer 1(f) of Pleading No. 32].

150. Respondent's Answer 20C filed on June 7, 1979 to Bar Counsel's Interrogatories (Pleading No. 5). ("As to Draper, most of his such calls and contacts seemed to have been with my office staff...").

151. Respondent's Further and Supplemental Answers to Interrogatories filed June 7, 1979 (at 4). Pleading 70-A.

152. Respondent's Exhibit 30 - Document 110 - Transcript March 23, 1977 hearing - "Court: Gentlemen, I understand that this matter is brought before the court on exceptions to Answers to Interrogatories and on a Petition to Modify the Decree and...counsel for Mrs. Draper...indicated that he was dropping his exceptions and did not want a hearing on them,is that correct?... Mr. Kerpelman: Correct, Your Honor" at 3, Respondent filed an initial petition for modification on May 14, 1976 and after Draper illegally "snatched" the child in New York, Respondent filed a petition for immediate hearing (Docket Entries).

153. Id., Document 10.

154. Id., Document 110 at 198.

155. Id.

156. Id. Document 110 at 49.

157. Pleading 32 at 4 [Answer(r)].

158. Pleading 41 at 3 (Answer 18).

159. Respondent's Exhibit 30.

160. Id.

161. Id. - Document 110 at 49.

162. Respondent sought to prove the child ran to Draper and not Marlene when Marlene came to the house with police.

163. Respondent's Exhibit 30 - Document 110 at 49.

164. Id., at 75.

165. Respondent's Memorandum of Law at

166. Respondent's Memorandum of Law at 31.

167. Cook, Knowing Your Client: The First Interview (Family Law) Trial, Jan., 1980, Vol. 16 No. 1

168. Respondent's Answer to Bar Counsels Request for Admission, Pleading 30 at 7(j).

169. T. May 15, 1979 at 93.

170. Judge James L. Oakes, United States Circuit Court of Appeals, Second Circuit (Ethics and Advocacy, Report of the 1978 Chief Justice Earl Warren Conference on Advocacy at 4).

171. Petitioner's Exhibit 50.

172. T. June 17, 1979 at 109.

173. T. June 18, 1979 at 127, 128.

174. Respondent's Exhibit 3 - Document 23.

175. T. June 18, 1979 at 127-131.

176. Respondent's Exhibit 30. Document 110 at 79.

177. T. June 18, 1979 at 159.

178. T. June 18, 1979 at 128.

179. Respondent's Exhibit30 - Document 110 at 82.

180. Respondent's Exhibit 30 - Document 24.

181. Petitioner's Exhibit 49.

182. Respondent's Exhibit 30, Document 37.

183. Id., Document 102.

184. T. June 18, 1979 at 111-114; Petitioner's Exhibit 8,9.

185. Petitioner's Exhibit 51.

186. T. July 13, 1979 at 46.

187. T. June 18, 1979 at 177.

188. Id., at 159.

189. Pleading 32 (Respondent's Answer 2(i) at 3 to Bar Counsel's Request - (Pleading 3).

190. Id., at 189.

191. Id. at 194.

192. Id. at 195.

193. Id.

194. T. July 13, 1979 at 48-49.

195. Id. at 49.

196. T. May 29, 1979 at 3 (lines 17-19).

197. T. June 22, 1979 at 16 (lines 9-10).

198. T. July 10, 1979 at 77 (lines 12-24).

199. T. July 11, 1979 at 9 (line 7).

200. T. July 12, 1979 at 45 (line 25) and 46 (line 1).

201. T. July 13, 1979 at 27 (lines 24-25).

202. T. July 19, 1979 at 38.

204. Respondent's Exhibit 31.

205. T. July 13, 1979 at 43.

206. Id., at 44.

207. Respondent's Exhibit 30 - Document 110 at 182.

208. Id. at 182- 83.

209. T. July 13, 1979 at 43.

210. T. August 31, 1979 at 56.

211. Id., at 58.

212. Id., at 59.

213. T. September 5, 1979 at 69.

214. T. September 5, 1979 at 26. While the Brecka decree did not specify custody in the mother, the implication was that Brecka should only have certain visitation rights.

215. T. August 31, 1979 at 91.

216. Id. at 86-88.

217. T. June 19, 1979 at 76.

218.

218A. See notes 93 and 94, supra.

219. Respondent's Exhibit 44 - Document 1 at 4.

220. Petitioner's Exhibit 63 at 5.

221. Petitioner's Exhibit 29.

222. T. June 19, 1979 at 32.

223. Respondent's Exhibit 3(L); see also T. June 18, 1979 at 35.

224. Petitioner's Exhibit 30.

225. Petitioner's Exhibit 32.

226. Malcomb felt Respondent's preparation was inadequate; Respondent had been brusk and short with him; and Respondent had brushed him off and ignored him.

227. T. June 19, 1979 at 36.

228. Petitioner's Exhibit 57 (second sheet of paper).

229. T. June 19, 1979 at 40.

230. Id. at 43-44.

231. Id. at 45.

232. Id. at 46.

233. Petitioner's Exhibit 34.

234. Petitioner's Exhibit 36.

235. Petitioner's Exhibit 37.

236. Petitioner's Exhibit 63 at 150.

237. "$25.00 per week "of" (or?) $1,300.00 per year; a total value . for the time you will be paying for the support of at least $13,000.00"- Petitioner's Exhibit 39(at 2).

238. Id.

239. T. June 19, 1979 at 62.

240. Petitioner's Exhibit 40.

241. Petitioner's Exhibit 41.

242. Petitioner's Exhibit 42.

243. Petitioner's Exhibit 44.

244. Petitioner's Exhibit 46.

245. Petitioner's Exhibit 43.

246. Petitioner's Exhibit 3B and 3A.

247. T. July 13, 1979 at 124.

248. Id., at 95.

249. Id., at 96.

250. Id., at 97.

251. Respondent's Memorandum of Law at 5.

252. Id., at 4.

253. Id.

254. Id., at 21-23.

255. Id., at 24.

256. T. September 4, 1979 at 21.

257. Id.
257A. T. July 13, 1979 at 85.
258. Respondent's Memorandum of Law at 2; Respondent's Exhibit 6.

259. Respondent's Exhibit 6.

260. Petitioner's Exhibit 30.

261. Petitioner's Exhibit 3 J.

262. Petitioner's Exhibit 41.

263. Petitioner's Exhibit 43.

264. Petitioner's Exhibit 58 at 7.

265. T. June 19, 1979 at 91.

266. T. August 30, 1979 at 75-79.

267. Petitioner's Exhibit 3-F.

267A. T. July 17, 1979 at 22.

268. Pleading 30 at 4.

269. Petitioner's Exhibit 37.

270. Petitioner's Exhibit 39.

271. Respondent's Exhibit 44 - Document 16 (Malcomb's answers to Merle's Interrogatories). Answer No. 3.

272. T. July 13, 1979 at 124.

273. Respondent's Exhibit 5.

274. T. August 30, 1979 at 84-85.

275. Id. at 87-93.

276. Petitioner's Exhibit 3-K

277. T. August 30, 1979 at 143.

278. Id., at 142.

279. Id., at 144.

280. T. June 19, 1979 at 75, 76.

281. T. July 19, 1979 at 108 ("I got the letter calling me a liar and a cheat and I turned around and filed suit").

282. T. June 19, 1979 at 59; Petitioner's Exhibit 63 at 33 ("The Court: 'By the way, the children are not in the courtroom, are they?' 'Mr. Hammond: No, sir'").

283. Petitioner's Exhibit 37.

284. Petitioner's Exhibit 36 (at 2).

285. Id., at 1.

286. Petitioner's Exhibit 37.

287. T. May 2, 1979 at 63.

288. T. April 18, 1979 at 2.

289. T. June 19, 1979 at 94-99 and 105.

290. Id., at 101.

291. Id., at 108-109

292. Id., at 111.

293. Petitioner's Exhibit 47.

294. T. June 21, 1979 at 36-37.

295. Id. at 48-49.

296. T. June 19, 1979 at 45.

297. Respondent's Memorandum of Law at 14.

298. T. June 21, 1979 at 53.

299. Respondent's Exhibit 2.

300. Respondent's Memorandum of Law at 15.

301. T. June 19, 1979 at 46.

302. Respondent's Exhibit 56.

303. Respondent's Memorandum of Law at 14.

304. Respondent's Exhibit 58.

305. Respondent's Exhibit 44 - Document 16.

306. Respondent's Memorandum of Law at 15.

307. Petitioner's Exhibit 36.

308. Malcomb paid $50.00 of the $650.00 bill so as not to anger Respondent and jeopardize his case. But he never intended to pay it and never did pay it.

309. Respondent's Memorandum of Law at 14.

310. Petitioner's Exhibit 37.

311. Petitioner's Exhibit 36 (at 2).

312. Respondent's Exhibit 2.

313. Bar Counsel's Reply Memorandum at 7.

314. Respondent's Memorandum of Law at 9.

315. T. September 5, 1979 at 113.

316. T. July 12, 1979 at 100.

317. T. September 5, 1979 at 113.

318. Petitioner's Exhibit 69.

319. T. September 5, 1979 at 117.

320. Mr. Hanson and Respondent are still friends ("If there is a basic integrity or friendship, I believe those things will pass over"). T. September 5, 1979 at 119.

321. T. July 12, 1979.

322. Court's Exhibit 4.

323. Id., (44 page transcript).

324. Respondent's Exhibit 28 (second sheet).

325. Court's Exhibit 4.

Section 18. Powers and duties of Chief Judge of Court of Appeals; assignment of judges; rule-making power of Court of Appeals.

(a) The Court of Appeals from time to time shall make rules and regulations to revise the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations prescribed by the Court of Appeals or otherwise by law.

(b) The Chief Judge of the Court of Appeals shall be the administrative head of the Judicial system of the State. He shall from time to time require, from each of the judges of the Circuit Courts for the several counties, of the Supreme Bench of Baltimore City, of the District Court and of any intermediate courts of appeal, reports as to the judicial work and business of each of the judges and their respective courts. He may, in case of a vacancy, or of the illness, disqualification or other absence of a judge or for the purpose of relieving an accumulation of business in any court assign any judge except a judge of the Orphans' Court to sit temporarily in any court except an Orphans' Court. Any judge assigned by the Chief Judge of the Court of Appeals pursuant to this section shall have all the power and authority pertaining to a judge of the court to which he is so assigned; and his power and authority shall continue with respect to all cases (including any motion, or other matters incidental thereto) which may come before him by virtue of such assignment until his action thereon shall be completed. In the absence of the Chief Judge of the Court of Appeals the provisions of this section shall be applicable to the senior judge present in said Court of Appeals. The powers of the Chief Judge under the aforegoing provisions of this section shall be subject to such rules and regulations, if any, as the Court of Appeals may make. (1943, ch. 772, ratified Nov. 7, 1944; 1966, ch. 10, ratified Nov. 8, 1966; 1969, ch. 789, ratified Nov. 3, 1970; 1977, ch. 681, ratified Nov. 7, 1978.)

A. 130

MARYLAND LAWS OF 1977

CHAPTER 305

(Senate Bill 239)

AN ACT concerning

Attorneys - Discipline

FOR the purpose of repealing those provisions relating generally to disciplining of attorneys; prohibiting the practice of law by an attorney who is suspended, on inactive status or disbarred; providing a penalty therefor; providing a certain period to wind up the affairs of his law practice; prohibiting certain officials from acting as an agent for a lawyer in solicitation of clients from place or criminal punishment; and providing a penalty.

BY repealing

Article 10 - Attorneys at Law and Attorneys in Fact
Sections 11, 12, 13, 13A, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26
Annotated Code of Maryland
(1976 Replacement Volume and 1976 Supplement)

BY adding to

Article 10 - Attorneys at Law and Attorneys in Fact
Section 11 and 12
Annotated Code of Maryland
(1976 Replacement Volume and 1976 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That Sections 11, 12, 13, 13A, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of Article 10 - Attorneys at Law and Attorneys in Fact, of the Annotated Code of Maryland (1976 Replacement Volume and 1976 Supplement) be and they are hereby repealed.

SECTION 2. AND BE IT FURTHER ENACTED, That new Sections 11 and 12 be and they are hereby added to Article 10 - Attorneys at Law and Attorneys in Fact, of the Annotated Code of Maryland (1976 Replacement Volume and 1976 Supplement) to read as follows:

Article 10 - Attorneys at Law and Attorneys in Fact

11.

AN ATTORNEY WHO PRACTICES LAW IN THE STATE DURING THE TIME OF HIS SUSPENSION, INACTIVE STATUS, OR DISBARMENT IS GUILTY OF A MISDEMEANOR AND ON CONVICTION SHALL BE FINED NOT MORE THAN $1,000 OR BE IMPRISONED FOR NOT MORE THAN ONE YEAR, OR BOTH FINED AND IMPRISONED, IN THE DISCRETION OF THE COURT. ~~HOWEVER, AN ATTORNEY IS NOT IN VIOLATION OF THIS SECTION FOR A PERIOD OF 30 DAYS FROM THE EFFECTIVE DATE OF THE ORDER SUSPENDING OR DISBARRING HIM OR PLACING HIM ON INACTIVE STATUS IF HE DOES NOT ENGAGE IN THE PRACTICE OF LAW.~~ HE MAY PAY, SATISFY, AND DISCHARGE ANY OF HIS EXISTING DEBTS AND OBLIGATIONS, AND COLLECT AND DISTRIBUTE HIS ACCOUNTS RECEIVABLE, AND DO ANY OTHER ACTS REQUIRED TO CONCLUDE THE AFFAIRS OF HIS LAW PRACTICE FOR THE PERIOD OF HIS SUSPENSION OR INACTIVE STATUS, OR PERMANENTLY IN THE CASE OF HIS DISBARMENT, PROVIDED THAT NO ACT PERMITTED HEREUNDER MAY BE THE PRACTICE OF LAW.

12.

ANY SHERIFF, DEPUTY SHERIFF, CONSTABLE, TURNKEY, POLICE OFFICER, OR OTHER LAW - ENFORCEMENT OFFICIAL WHO ACTS AS AGENT OR BROKER FOR A LAWYER WHO SOLICITS CLIENTAGE OF PERSONS CONFINED IN A JAIL, STATION HOUSE, OR OTHER PLACE OF CRIMINAL PUNISHMENT AWAITING TRIAL IS GUILTY OF A MISDEMEANOR AND, ON CONVICTION, SHALL BE FINED NOT MORE THAN $1,000 OR BE IMPRISONED, IN THE DISCRETION OF THE COURT, FOR NOT MORE THAN ONE YEAR.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1977.

Approved May 17, 1977.

MARYLAND RULES OF PROCEDURE

CHAPTER 1100

SPECIAL PROCEEDINGS

SUBTITLE BV. DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS.

RULE BV1. DEFINITIONS.

In this Subtitle, the following terms have the following meanings, except as expressly otherwise provided, or as may result from necessary implications:

a. ATTORNEY.

"Attorney" means any person admitted by the Court of Appeals to practice law. For purposes of discipline or inactive status, the term also includes a member of the bar of any other state, district, or territory of the United States who is employed as counsel in any case pending before any judicial tribunal or Orphans' Court sitting in this State, or before any administrative agency of this State, as defined in Rule B 1 b.

b. BAR ASSOCIATION.

"Bar Association" means:

(i) In Baltimore City, The Bar Association of Baltimore City; or

(ii) In each county, the bar association with the greatest number of members who are residents of the county and who maintain their principal office for the practice of law in that county.

c. BAR COUNSEL

"Bar Counsel" means the person appointed by the Commission as the principal executive officer of the disciplinary system affecting attorneys

d. CHARGES.

"Charges" mean the initial pleading filed in the Court of Appeals against an attorney alleging that he is guilty of misconduct or that he is incompetent or both.

e. COMMISSION.

"Commission" means the Attorney Grievance Commission of Maryland.

RULES SERVICE CO. COPYRIGHT, 1975 WASHINGTON, D.C.

f. COURT.

"Court" means ~~the panel of judges selected by the Court of Appeals,~~ and the location where the ~~Court~~ judge or judges will conduct the hearing and includes the Supreme Bench of Baltimore City.

g. DISTRICT.

"District" means one of the Districts set forth in section 1-602 of the Courts Article. (Added 47th Report, Feb. 20, 1975)

h. INCOMPETENT.

"Incompetent" means unable to render adequate legal service by reason of mental or physical illness or infirmity, or addiction to or dependence upon an intoxicant or drug. (Added 47th Report, Feb. 20, 1975)

i. JUDICIAL TRIBUNAL.

"Judicial Tribunal" means a court, the District Court of Maryland, the Court of Appeals, the Court of Special Appeals, any United States Court and a court of another state having general or appellate jurisdiction. (Added 47th Report, Feb. 20, 1975)

j. MISCONDUCT.

"Misconduct" means an act or omission by an attorney, individually or in concert with any other person or persons which violates the Disciplinary Rules of the Code of Professional Responsibility, as adopted by Rule 1230, whether or not the act or omission occurred in the course of an attorney-client relationship. (Added 47th Report, Feb. 20, 1975)

k. OFFICE FOR THE PRACTICE OF LAW.

"Office for the Practice of Law" means an office maintained for the practice of law in which an attorney usually devotes a substantial part of his time to the practice of law during ordinary business hours in the traditional work week; or if there is no such office, the last known address of the attorney. (Added 47th Report, Feb. 20, 1975)

RULE BV2. ATTORNEY GRIEVANCE COMMISSION.

a. CREATION AND PURPOSE.

The Attorney Grievance Commission of Maryland is authorized and created. The Commission shall supervise and administer the discipline and inactive status of attorneys in accordance with this subtitle. (Added 47th Report, Feb. 20, 1975)

 COPYRIGHT, 1978

b. COMPOSITION.

The Commission consists of ~~eight attorneys~~ ten members, two of whom shall not be attorneys, appointed by the Court of Appeals. One member shall be designated by the Court of Appeals as chairman of the Commission. The term of each member is four years, except that the initial terms of four of those first appointed to the Commission shall be one year, two years, three years and three years, respectively, and the initial term of the eighth and ninth members shall be two years, and the initial term of the tenth member shall be three years. No member is eligible for reappointment for a term immediately following the expiration of the member's service for one full term of four years. A member of the Commission may be removed by the Court of Appeals at any time.

c. COMPENSATION. (Added 47th Report, February 20, 1975)

A member of the Commission may not receive compensation for serving in that capacity, but is entitled to reimbursement for his expenses reasonably incurred in the performance of his duties, including but not limited to transportation costs.

d. DISCIPLINARY FUND. (Added 47th Report, February 20, 1975)

1. Payments by Attorneys.

The disciplinary Fund is established. In addition to, and on the same date as, other sums required to be paid pursuant to Rule 1228 (Clients' Security Fund) each attorney shall, as a condition precedent to the practice of law, pay annually to the Disciplinary Fund the sum the Court of Appeals prescribes for any year. The annual payment required of an attorney during the first five years after the year in which he is admitted to the Maryland Bar (but excluding attorneys who are admitted to practice on petition) shall be no more than one-half that fixed for other attorneys.

2. Collection and Disbursement of Disciplinary Fund.

The treasurer of the Clients' Security Trust Fund of the Maryland Bar shall collect the sums paid by attorneys to the Disciplinary Fund and shall pay over such sums as the Commission from time to time directs.

3. Enforcement.

Enforcement of payment of annual assessments of attorneys pursuant to this Rule is governed by the provisions of Section g of Rule 1228 (Clients' Security Fund).

RULE BV3. COMMISSION PROCEDURES AND POWERS.

a. QUORUM. (Amended July 1, 1978)

A majority of the full authorized membership of the Commission constitutes a quorum for the transaction of business and the concurrence of at least that many members is required for all action taken by the Commission.

 COPYRIGHT, 1979

b. POWERS AND DUTIES.

The Commission has powers and duties to:

(i) Recommend to the Court of Appeals for its adoption procedural and administrative rules relating to the disciplinary system affecting attorneys; (Added 47th Report, 2/20/75)

(ii) Appoint and supervise the activities of the Bar Counsel; (Added 47th Report, 2/20/75)

(iii) Authorize the Bar Counsel to employ attorneys, investigators and clerical personnel and to prescribe their compensation; (Added 47th Report, 2/20/75)

(iv) Appoint those ~~attorneys selected~~ persons as provided in Rule BV 5 c 1 (Inquiry Committee and Review Board - Inquiry Committee - Composition) to serve as members of the Inquiry Committee and remove any members for cause; failure to assume regularly the responsibilities of a member shall be cause for removal;

(v) Appoint those ~~attorneys selected~~ persons as provided in Rule BV 5 d (Inquiry Committee and Review Board - Review Board) to serve as members of the Review Board and remove any members for cause; failure to assume regularly the responsibilities of a member shall be cause for removal;

(vi) Appoint counsel from time to time to assist the Bar Counsel in the performance of his duties; (Added 47th Report, 2/20/75)

(vii) Administer the Disciplinary Fund and file annually with the Court of Appeals, not later than September 1, an accounting thereof and a report of disciplinary activities for the previous fiscal year. The accounting and report shall be published by the Commission. There shall be an independent annual audit of the fund administered by it as directed by the Court of Appeals, the expenses of which audit shall be paid out of the fund; (Added 47th Report, 2/20/75)

(viii) Submit an annual report to the Court of Appeals, not later than September 1, evaluating the effectiveness of the disciplinary system and recommending any desirable changes. The report may include statistical data and opinions of the Review Board. The report shall be published at least annually by the Commission, subject to the provisions of Rule BV 8 (Confidentiality); and (Added 47th Report, 2/20/75)

RULES SERVICE CO. COPYRIGHT, 1980 WASHINGTON, D.C.

MARYLAND RULES OF PROCEDURE

(ix) Submit annually to the State Court Administrator a proposed budget for the disciplinary system. The budget is subject to review and approval by the Court of Appeals.

RULE BV4. BAR COUNSEL.

a. APPOINTMENT.

The Commission shall appoint, subject to approval of the Court of Appeals, an attorney to serve, at the pleasure of the Commission, as Bar Counsel of the disciplinary system. The Bar Counsel is the principal executive officer of the disciplinary system, and shall receive compensation as authorized from time to time in the budget of the Commission.

b. POWERS AND DUTIES.

Subject to the supervision of the Commission, the Bar Counsel shall:

(i) Investigate all matters involving possible misconduct called to his attention whether by complaint or otherwise;

(ii) Prosecute disciplinary and inactive status cases and enforce compliance with all disciplinary orders of the Court of Appeals;

(iii) Investigate petitions for reinstatement and for termination of suspension and inactive status and applications for resignation from the practice of law, and represent the public interest in those proceedings;

(iv) Employ, at the compensation authorized by the Commission, investigative, clerical and legal personnel necessary for the efficient conduct of his office;

(v) Discharge any person whose performance is unsatisfactory to him; and

(vi) Maintain records, make reports and perform other duties prescribed by the Commission from time to time or required by these Rules.

RULE BV5. INQUIRY COMMITTEE AND RENIEW BOARD.

a. CREATION.

An inquiry Conumittee and Review Board is each authorized and created.

 COPYRIGHT, 1978

b. COMPENSATION.

A member of the Inquiry Committee or of the Review Board may not receive compensation for serving in that capacity, but is entitled to reimbursement for his expenses reasonably incurred in the performance of his duties, including but not limited to transportation costs. (Added 47th Report, 2/20/75)

[EDITOR'S NOTE: Due to the extensive amendment of subsection c., the previous text is not shown.]

c. INQUIRY COMMITTEE.

1. Composition.

The Inquiry Committee shall consist of a number of persons, none of whom shall be judges, equal to three times the number of Judges of the District Court (excluding the Chief Judge) authorized by law. The number of members of the Inquiry Committee for each county or Baltimore City shall be three times the number of Judges of the District Court resident in that county or Baltimore City authorized by law, two-thirds of whom shall be attorneys whose principal office for the practice of law shall be located in that county or Baltimore City and one-third of whom shall be non-attorneys whose residence shall be located in that county or Baltimore City. The attorney members of the Inquiry Committee shall be selected by the Bar Association of the appropriate county or Baltimore City, in the manner determined by it, and each attorney so selected shall be appointed by the Commission unless such attorney would be subject to removal for cause. The Commission shall establish by notice to such Bar Association the time within which that Association is to make its selections. Upon the failure of a Bar Association timely to select any Committee member, the Commission may appoint any attorney of this State who is not a judge to such membership on the Inquiry Committee. The non-attorney members shall be selected and appointed by the Commission on the basis of merit and demonstrated competence, ability and good judgment, after the solicitation of recommendations from the Bar Association of the appropriate county or Baltimore City and from the general public, in such manner as the Commission may deem appropriate.

2. Terms.

The Commission shall set the term membership of each member of the Inquiry Committee. Terms of the initial appointees need not be uniform. Terms may not exceed three years except that the Commission may extend the term of any member who is assigned to a panel until the completion of a pending inquiry. Any member of the Inquiry Committee is eligible for successive terms.

[Next Page is No. MRP-502.1]

RULES SERVICE CO. COPYRIGHT, 1980 WASHINGTON, D.C.

MARYLAND RULES OF PROCEDURE

~~3. Associate Members.~~ ~~4.~~ 3. Chairman.

The Commission shall select from among the ~~regular~~ members of the Inquiry Committee, a chairman and one or more vice-chairmen, each to serve for a term of one year.

d. REVIEW BOARD.

The Review Board shall consist of ~~fifteen attorneys~~ eighteen persons, ~~who are not~~ none of whom shall be judges. There shall be fifteen attorney members to be selected by the Board of Governors of the Maryland State Bar Association, Inc. The Commission shall appoint each attorney selected unless he would be subject to removal for cause. In each of the Appellate Judicial Circuits there are the following number of attorney members of the Review Board, each of whom has his principal office for the practice of law in that Appellate Judicial Circuit:

Appellate Judicial Circuit	Number of Members
First	~~2~~ 1
Second	2
Third	~~2~~ 3
Fourth	2
Fifth	2
Sixth	5

The Commission shall establish by notice to such Bar Association the time within which it is to make its selections. Upon failure of the Association tmely to select any Board member, the Commission may appoint any attorney whose principal office for the practic of law shall be located in the appropriate Appellate Judicial Circuit to such membership on the Review Board. There shall be three non-attorney members from the State at large who shall be selected and appointed by the Commission on the basis of merit and demonstrated competence, ability and good judgment, after the solicitation of recommendations from the Maryland State Bar Association, Inc., and from the general public, in such manner as the Commission may deem appropriate. The term of each member is three years. ~~except that, of those first appointed, one-third shall be appointed initially for a one-year term and one-third shall be appointed initially for a two-year term.~~ No member is eligible for reappointment for a term immediately following the expiration of the member's service for one full term of three years. The Commission shall designate one member as Chairman of the Review Board and one or more members as Vice-Chairman.

MARYLAND RULES OF PROCEDURE

RULE BV 6. COMPLAINTS AND INVESTIGATIONS. (Added 47th Report, July 1, 1975)

a. ~~INVESTIGATION.~~ BAR COUNSEL.

1. Filing and Investigation.

Every complaint that an attorney has committed an act of misconduct or that he is incompetent shall be filed with and recorded by the Bar Counsel. The Bar Counsel shall investigate each complaint.

2. Dismissals.

If in the opinion of the Bar Counsel ~~finds that~~ the complaint is without merit or the attorney has engaged in misconduct which does not warrant discipline, he may dismiss the complaint, subject to approval by the Chairman of the Inquiry Committee or a Vice Chairman designated by the Chairman. The Bar Counsel shall send the attorney and the person who made the complaint written notice that the complaint has been dismissed. ~~and he may~~ He shall send ~~either or both~~ to the complainant with a copy to the attorney any additional information ~~and comments~~ which the Chairman or a Vice Chairman directs. If in the opinion of Bar Counsel the attorney has engaged in misconduct, he may, with the approval of the Chairman or a Vice Chairman designated by the Chairman ~~shall approve~~ accompany the dismissal with a separate warning against future misconduct.

Committee Note.- ~~Comments~~ A warning by the Bar Counsel whether under this section, or at the direction of an Inquiry Panel pursuant to Rule BV6 c 4(c), or at the direction of the Review Board pursuant to Rule BV7 b, ~~are~~ is not a reprimand or discipline of any kind.

3. Reprimand.

If in the opinion of Bar Counsel the attorney is guilty of misconduct for which a reprimand should be administered, if an inquiry panel proceeding has been dispensed with pursuant to Rule BV6 b and if there is approval by the Chairman of the Inquiry Committee or a Vice Chairman designated by the Chairman and the Review Board Bar Counsel may administer a reprimand. Unless otherwise directed by the Review Board, the reprimand shall be in writing and served upon the attorney by the Bar Counsel at the attorney's Office for the Practice of Law. Upon the written request of the attorney that charges be filed against him, made within 15 days of the date of service of the reprimand, the review board shall (i) direct the Bar Counsel to file charges against the attorney pursuant to Rule BV9 (Charges) (ii) remand for further proceedings or (iii) withdraw the reprimand and dismiss the complaint against the attorney. A court may waive the 15 day period if satisfied that the attorney has had no notice of the complaint against him.

RULES SERVICE CO. COPYRIGHT, 1978 WASHINGTON, D.C.

MARYLAND RULES OF PROCEDURE

4. Reference to Inquiry Panel.

Unless a complaint is ~~found to be without merit~~ dismissed ~~or a reprimand is administered~~ or an Inquiry Panel proceeding has been dispensed with pursuant to Rule BV 6 b, the Bar Counsel shall refer the complaint to an Inquiry Panel and give notice of the complaint to the attorney against whom the complaint has been made. The notice shall inform the attorney of the nature of the complaint made. In unusual or extraordinary circumstances, the Bar Counsel, in his discretion, may defer giving notice to the attorney for a reasonable time.

b. INQUIRY PANEL PROCEEDING NOT REQUIRED.

1. When Not Required.

An Inquiry Panel proceeding is not required in a case where either:

(a) Both the attorney complained against and the Bar Counsel waive an Inquiry Panel Proceeding in writing; or

(b) The complaint is either (i) that there has been a final judgment of conviction as defined by Rule BV10 e.1 of a crime punishable by imprisonment for more than one year; or (ii) that the attorney has been adjudged guilty of misconduct by a judicial tribunal in a disciplinary proceeding as defined by Rule BV 10 e.1 and that the adjudication of misconduct has become final.

2. Withdrawal of Waiver.

A written waiver of an inquiry panel proceeding may not be withdrawn except upon approval of the Review Board for good cause shown.

3. Procedure.

The Bar Counsel shall file any written waiver of the Inquiry Panel proceeding as part of the file in the case. If in the opinion of the Bar Counsel discipline is warranted, he shall forward his recommendation and the file relating to the complaint to the Review Board for consideration pursuant to Rule BV 7. The Review Board shall permit oral argument upon the request of either the attorney or Bar Counsel.

MRP-502.3
COPYRIGHT, 1978

c. SELECTION OF INQUIRY PANEL.

The Chairman of the Inquiry Committee or a Vice Chairman designated by the Chairman shall appoint at least three ~~regular~~ members of the Inquiry Committee to serve on each Inquiry Panel and shall designate one Panel member to serve as Panel Chairman. A majority of the Panel to which a complaint is assigned shall consist of attorneys, and at least one member of each Panel shall be a non-attorney. At least one-half of the Panel to which a complaint is assigned shall consist of members from the District in which the attorney against whom the complaint has been made has an office for the practice of law, unless the Chairman of the Inquiry Committee finds this requirement to be impracticable.

d. INQUIRY PANEL PROCEEDINGS.

1. Generally. (Added 47th Report, 7/1/75)

Except as provided by these Rules, no action except dismissal of the complaint may be taken unless the attorney against whom the complaint has been made has been afforded an opportunity to examine and controvert the complaint and be represented by counsel. The rules of evidence need not apply at any proceeding before the Inquiry Panel. If the attorney cannot be found after the Inquiry Panel has made reasonable efforts to notify him, the Inquiry Panel may proceed pursuant to this subtitle without complying with the requirements of this section.

2. Quorum.

~~The Chairman~~ Three members of the Inquiry ~~Committee~~ Panel shall ~~determine the number of regular members of the Inquiry Committee to~~ constitute a quorum, ~~for panel proceedings under this subtitle, but in no event may a quorum consist of less than three members.~~ provided that a majority of the Panel members present shall be attorneys. The presence of a non-attorney member shall not be required to constitute a quorum.

3. Witnesses - Testimony - Depositions. (Added 47th Report, 7/1/75)

(a) Oaths; Testimony.

An Inquiry Panel may administer oaths to and take the testimony of witnesses.

(b) Depositions.

(1) When may be taken.

Where a witness is either:

(i) Unable to attend because of illness or other disability, or

(ii) unwilling to attend and is not subject to summons as provided in paragraph (c) of this subsection.

Either the Bar Counsel or the attorney against whom the complaint has been made may take the deposition of the witness and offer it as evidence before the Inquiry Panel.

(2) Procedure.

Chapter 400 of these Rules governs the taking of depositions in proceedings before an Inquiry Panel except:

(i) the notice required by Rule 405 (Notice for Deposition) shall be given to the attorney if the deposition is taken by the Bar Counsel and to the Bar Counsel if the deposition is taken by the attorney. All notices shall be filed with the Inquiry Panel and the Bar Counsel;

(ii) Rules 402 d and 411 b 2 are not applicable;

(iii) the deposition shall be filed with the Panel togethe with the papers referred to in paragraph (c) of this subsection; and

(iv) the Panel Chairman may make rules pertaining to any deposition as justice might require.

(c) Summons.

If in a proceeding before an Inquiry Panel the Attendance and testimony of a witness or the production of books, documents or other tangible things is required, the Panel on its own motion, or on motion of the Bar Counsel or the attorney against whom the complaint has been made, shall cause a summons to be issued by a clerk pursuant to Rule 114 (Witness – Summons for) or Rule 115 (Summons *Duces Tecum*). The summons may not divulge the name of the attorney against whom the complaint has been made, except to the extent that this requirement is impracticable. The sheriff's return shall be made as directed in the summons and the proceedings may not be docketed in court. The Bar Counsel shall maintain dockets and files of all papers filed in the proceedings.

MRP-502.5
COPYRIGHT, 1978

MARYLAND RULES OF PROCEDURE

(d) ~~Certified~~ Registered Letter in Lieu of Summons.

If in a proceeding before an Inquiry Panel the attendance and testimony of or the production of books, documents or other records by any attorney is required, the Panel may command the attendance and testimony of or production by that attorney by sending him a letter by ~~certified~~ registered mail addressed to his Office for the Practice of Law, and the letter shall be as effective against the attorney as if a summons had been issued pursuant to subparagraph (c) of this Rule.

(e) Sanction – Attachment – Contempt. (Added 47th Report, July 1, 1975)

Whenever any person summoned to appear and give testimony or to produce books, documents or other tangible things, fails or refuses to appear or to answer any proper question or to produce the items requested, the party requesting the summons may, by motion which may not divulge the name of the attorney against whom the complaint has been made (except to the extent that this requirement is impracticable), request a court to issue an attachment pursuant to section d of Rule 114, or to cite the person for contempt pursuant to Subtitle P of these Rules, or both. (Added 47th Report, July 1, 1975)

4. Disposition. (Added 47th Report, July 1, 1975)

(a) Action by Inquiry Panel. (Added 47th Report, July 1, 1975)

The Inquiry Panel may dismiss the complaint without a hearing. Otherwise, the Panel shall conduct a hearing and shall recommend that: (Added 47th Report, July 1, 1975)

(i) the complaint be dismissed; (Added 47th Rpt., 7/1/75)

(ii) the attorney be reprimanded; or (Added 47th Rpt., July 1, 1975)

(iii) charges be filed against the attorney. (Added 47th Rpt. July 1, 1975)

(b) Recommendation of Reprimand or Charges. (Added 47th Report, July 1, 1975)

If the Panel finds that the attorney against whom the complaint has been filed either has committed an act of misconduct or is incompetent, the Panel shall state the basis therefor in writing. The Panel shall file with the Bar Counsel its recommendations, the reasons therefor and any evidence taken in the proceedings. A member of the Panel who disagrees with the recommendation of the majority may file a written minority report with the Bar Counsel. The Bar Counsel shall transmit to the Review Board and to the attorney, copies of the recommendations, reports and, wherever practical, copies of any evidence. (Added 47th Report, July 1, 1975)

[Next Page is Page MRP-502.6a]

RULES SERVICE CO. COPYRIGHT, 1978 WASHINGTON, D.C.

MARYLAND RULES OF PROCEDURE

(c) Unanimous Recommendation of Dismissal. (Added 47th Report, 7/1/75)

(i) If, with or without a hearing, the Panel determines unanimously that the complaint shall be dismissed, the Panel shall state the reasons for the dismissal in writing and shall file the statement and any evidence with the Bar Counsel. A transcript of any testimony of which a record may have been made need not be prepared if it is not requested by Bar Counsel. Unless within the time required by subparagraph (ii), the Bar Counsel requests a review pursuant to subparagraph (ii), the Bar Counsel shall send the attorney and the person who made the complaint written notice that the complaint has been dismissed. ~~and he~~ If, in the opinion of the panel, the attorney is guilty of misconduct which does not warrant discipline, Bar Counsel shall send the attorney a warning against future misconduct if ~~either or both additional information and comments as~~ the Panel so directs, in which case he may also advise the ~~complained~~ complainant that the conduct, in the opinion of the panel, do not warrant discipline.

(ii) If, after review of the statement of reasons for dismissal, and of the evidence, including a transcript of all testimony of which a record has been made, the Bar Counsel believes that dismissal is not warranted, he may, subject to approval by the Attorney Grievance Commission, transmit to the Review Board and to the attorney, without cost to him: (Added 57th Report, 1/1/77)

(1) Copies of the Panel's reason for dismissal; (Added 57th Report, 1/1/77)

(2) A statement of the reasons why Bar Counsel is causing review to be made by the Review Board, and (Added 57th Report, 1/1/77)

(3) Copies of any evidence, including a transcript of testimony. (Added 57th Report, 1/1/77)

The transmittal shall be made within 90 days of receipt by Bar Counsel of the Panel's reasons for dismissal. (Added 57th Report, 1/1/77)

MRP-502.6a
COPYRIGHT, 1978

(d) Non-unanimous Recommendation of Dismissal
(Added 47th Report, 7/1/75)

If, with or without a hearing, the Panel determines by less than a unanimous vote of all members of the Panel that the complaint should be dismissed, the Panel shall state the reasons therefor in writing. The Panel shall file its recommendations and report with the Bar Counsel, together with any evidence taken in the proceedings. Any member of the Panel opposing dismissal shall file a written minority report with the Bar Counsel. The Bar Counsel shall transmit to the Review Board and to the attorney, copies of the recommendations, reports and, whenever practical, copies of any evidence.

RULE BV7. REVIEW PROCEDURE.

a. QUORUM.

~~Nine members~~ A majority of the Review Board shall constitute a quorum, and the presence of a non-attorney member shall not be required to constitute the quorum. ~~and~~ The concurrence of not less than a majority of the members present ~~are~~ is necessary to a decision.

b. PROCEEDINGS OF REVIEW BOARD. (Added 47th Report, 7/1/75)

The Review Board shall review each case transmitted to the Board by the Bar Counsel pursuant to Rule BV 6 a, BV 6 b or BV 6 d. The Board may request oral argument in any proceedings before it. In cases where a hearing has been conducted by an Inquiry Panel or the hearing has been dispensed with pursuant to Rule BV 6 b, the Board may approve, reject or modify the recommendation, may remand for further proceedings, or may dismiss the complaint. In a case in which the Bar Counsel has recommended a reprimand pursuant to Rule BV 6 a 3, the Board may approve the recommendation, may remand for further proceedings, may direct the filing of charges if the inquiry panel proceedings were dispensed with pursuant to Rule BV 6b, or may dismiss the complaint. In all other cases the Review Board shall either remand the case for a hearing before a Panel, or dismiss the complaint. The Board shall state in writing the reasons for its decision. The Bar Counsel shall send the attorney and the person who made the complaint written notice of the decision of the Board. If in the opinion of the Review Board, the attorney is guilty of misconduct which does not warrant discipline, Bar Counsel shall send the attorney a warning against future misconduct if the Review Board so directs, in which case he may also advise the complainant that the conduct in the opinion of the Review Board does not warrant discipline.

 COPYRIGHT, 1980

MARYLAND RULES OF PROCEDURE

c. REPRIMAND. (Added 47th Report, July 1, 1975)

The Review Board may reprimand an attorney after reviewing the findings of the Inquiry Panel. Upon the written request of the attorney that charges be filed against him, made within 15 days of the date of service of the reprimand, the Review Board shall either (i) direct the Bar Counsel to file charges against the attorney pursuant to Rule BV9 (Charges), or (ii) withdraw the reprimand and dismiss the complaint against the attorney. A court may waive the 15 day period if satisfied that the attorney has had no notice of the complaint against him. Unless otherwise directed by the Review Board, the reprimand shall be served upon the attorney by the Bar Counsel at the attorney's Office for the Practice of Law. (Added 47th Report, July 1, 1975)

RULE BV8. CONFIDENTIALITY. (Added 47th Report, July 1, 1975)

a. GENERAL RULE. (Added 47th Report, July 1, 1975)

There may be no public proceedings by the Inquiry Committee or the Review Board. Unless otherwise ordered by the Commission, the record of any complaint, investigation, proceeding of the Inquiry Committee or theReview Board and of any reprimand shall be private and confidential, unless and until charges arising out of the proceeding shall be filed in the Court of Appeals, except as provided in this Rule. (Added 47th Report, July 1, 1975)

b. EXCEPTIONS. (Added 47th Report, July 1, 1975)

The following exceptions to privacy and confidentiality are hereby established: (Added 47th Report, July 1, 1975)

(1) With the approval of the Chairman or in his absence ~~or~~ the Vice-Chairman of the ~~Inquiry Committee~~ Commission the Bar Counsel may provide information involving criminal activity to law enforcement and prosecuting officials.

(2) The notification to a complainant by the Bar Counsel of the disposition of the complaint of that complainant is not private and confidential. (Renumbered 54th Rpt., July 1, 1976)

(3) A judicial tribunal may request and receive any information that is relevant to the business of the tribunal. (Renumbered 54th Report, July 1. 1976)

RULES SERVICE CO. COPYRIGHT, 1978 WASHINGTON, D.C.

~~(3)~~ (4) If an attorney is seeking admission to the practice of law before the bar of any judicial tribunal, or is under consideration for judicial office or for employment in legal work by federal, state or local government, a judicial tribunal, the appropriate committee of a Bar Association, the National Conference of Bar Examiners, a judicial nominating commission acting through its chairman or the appointing or hiring authority acting through ~~his~~ its duly appointed representatives may receive information concerning reprimands and ~~formal~~ charges not having resulted in dismissal.

~~(4)~~ (5) The fact that a complaint is pending may be revealed to a person authorized under ~~this~~ subsection (4). However, the nature of the pending complaint, the facts surrounding it, and the results of any investigation completed to the date of the inquiry, may be revealed only pursuant to the a waiver ~~and request of~~ by the attorney involved.

(6) The Bar Counsel may from time to time prepare and publish summaries of complaints without revealing identities of complainants, attorneys or witnesses where in his judgment the publication would tend to improve the administration of justice.

(7) If an attorney is accused of misconduct, the Commission may issue a short written statement of clarification, correction, or exoneration, or it may announce that a reprimand has been administered, if the attorney requests that the statement be issued.

[Next Page is MRP-502.7]

COPYRIGHT, 1978

MARYLAND RULES OF PROCEDURE

RULE BV9. CHARGES. (Added 47th Report, July 1, 1975)

a. WHO MAY FILE. (Added 47th Report, July 1, 1975)

Charges against an attorney shall be filed by the Bar Counsel acting at the direction of the Review Board. (Added 47th Report, July 1, 1975)

b. WHERE FILED AND HEARD.

Charges against an attorney shall be filed on behalf of the Commission in the Court of Appeals. The Court of Appeals by order may direct that the charges be transmitted to and heard in any court and shall designate the judge or judges to hear the charges and the clerk responsibl for maintaining the record in the proceeding.

c. FORM. (Added 47th Report, July 1, 1975)

The charges shall be in writing and shall be sufficiently clear and specific reasonably to inform the attorney proceeded against of any misconduct charged and of the basis of any allegation that he is incompetent. (Added 47th Report, July 1, 1975)

d. SERVICE.

The Court of Appeals shall direct in each case the manner of service of a copy of the charges which shall be served together with the order of the Court of Appeals designating the court and ~~panel of~~ judge or judges to hear the charges.

 COPYRIGHT, 1978

e. PLEADINGS.

1. Motion for Transfer.

Within fifteen days following the service of the order designating a court in which the charges shall be heard, the attorney charged may move in the Court of Appeals for a transfer of the hearing to another court. Action on the motion is in the discretion of the Court of Appeals. Filing the motion shall not stay the time for answer to the charges. Procedure on the motion is governed by the applicable provisions of Rule 855 (Application for Order – Motion – Answer). (Added 47th Report, July 1, 1975)

2. Time for Initial Pleading.

The attorney responding to the charges shall file his initial pleading in the court designated to hear the charges within fifteen days after the date of service of the charges upon him, unless a different time is fixed by the order of the Court of Appeals. (Added 47th Report, July 1, 1975)

3. Subsequent Pleadings.

Subsequent pleadings shall be governed by and filed in the court designated to hear the charges within the times set forth in the applicable providions of Chapter 300 (Pleading) of these Rules pertaining to pleadings in equity. (Added 47th Report, July 1, 1975)

RULE BV10. HEARINGS.

a. DISCOVERY – SAME AS IN CIVIL CASE.

Chapter 400 of these Rules governs the taking of depositions and discovery in the hearing of charges. (Added 47th Report, July 1, 1975)

b. PROCEDURAL DEFECTS.

The hearing of charges shall not be stayed or challenged by reason of any procedural defects alleged to have occurred prior to the filing of charges. (Added 47th Report, July 1, 1975)

c. NUMBER OF JUDGES.

The charges shall be heard by ~~not less than three (3) judges~~ one judge; however, upon petition filed by the attorney charged or the Attorney Grievance Commission and for good cause shown or on its own motion the Court of Appeals may designate two additional judges to consider the charges.

RULES SERVICE CO. COPYRIGHT, 1978 WASHINGTON, D. C.

MARYLAND RULES OF PROCEDURE

d. HEARINGS – CONDUCTED AS CIVIL CASE. (Added July 1, 1975)

The hearing of charges is governed by the same rules of law, evidence and procedure as are applicable to the trial of civil proceedings in equity. Factual findings shall be supported by clear and convincing evidence. (Added July 1, 1975)

e. CONVICTION OF CRIME – ADJUDICATION OF MISCONDUCT.

1. Proof of Guilt. (Added July 1, 1975)

In a hearing of charges pursuant to this Rule, a final judgment by a judicial tribunal in another proceeding convicting an attorney of a crime shall be conclusive proof of the guilt of the attorney of that crime. A plea or verdict of guilty, or a plea of *nolo contendere* followed by a fine or sentence, is a conviction within the meaning of this Rule. A final adjudication by a judicial tribunal or a disciplinary agency appointed by or acting at the direction of a judicial tribunal that an attorney has been guilty of misconduct is conclusive proof of the misconduct in the hearing of charges pursuant to this Rule.

2. Additional Evidence. (Added July 1, 1975)

The introduction of evidence in a proceeding pursuant to this Rule of an attorney's conviction of a crime in a judicial tribunal or adjudication of misconduct by a judicial tribunal, does not preclude the Commission from introducing additional evidence nor does it preclude the attorney from introducing evidence or otherwise showing cause why he should not be disciplined. (Added July 1, 1975)

RULE BV11. DISPOSITION OF CHARGES.

a. ~~RECOMMENDATIONS.~~ FINDINGS.

~~1. Discipline.~~

~~If the court finds that the attorney is guilty of misconduct, it may recommend that any of the following types of discipline be imposed: (i) disbarment, (ii) suspension, (iii) reprimand.~~ A written statement of the findings of facts, ~~the recommendation of the court, and its reasons therefor~~ and conclusions of law shall be filed in the record of the proceedings and copies sent to all parties.

~~2. Inactive Status.~~

~~If the court shall find that the attorney is incompetent, it shall recommend to the Court of Appeals that an order be passed placing such attorney on an inactive status.~~

 COPYRIGHT, 1978

b. SUBSEQUENT PROCEEDINGS.

1. Record. (Amended September 22, 1978)

Within 15 days after the findings and conclusions are filed, unless a different time is fixed by order of the Court of Appeals, the clerk of the court shall transmit the record to the Court of Appeals.

2. Exceptions.

Within 15 days after the filing of the record in the Court of Appeals, the attorney or the Bar Counsel may file in the Court of Appeals exceptions to the findings and conclusions, and may make recommendations respecting the disciplinary sanction to be imposed, if any, under b 4 of this Rule. An answer to the exceptions and recommendations shall be filed within 15 days from the filing of the exceptions, and recommendations. Copies of exceptions, recommendations and answers shall be served upon all other parties in the manner prescribed by section c of Rule 306 (Service of Pleadings and Other Papers), and proof of such service shall be served upon all other parties in the manner prescribed by section c of Rule 306 (Service of Pleadings and Other Papers, and proof of such service shall be made in the manner prescribed by section d of Rule 306 (Service of Pleadings and Other Papers - Proof of Service). Exceptions, recommendations and answers thereto shall be filed in eight legible typewritten copies. Cases under this Rule shall be disposed of as soon as practicable and may not be placed on the regular appeals docket.

3. Oral Argument (Added 47th Report, July 1, 1975)

Oral argument shall be had on any exceptions and shall be governed by Rule 846 (Oral Argument).

4. Review by Court of Appeals. (Amended September 22, 1978)

The Court of Appeals may order (i) disbarment, (ii) suspension, (iii) reprimand, (iv) placing attorney on an inactive status, (v) dismissal of charges, or may remand the case for further proceedings. The provisions of subsection 1, 2 and 3 of this section govern proceedings after the order or remand has been complied with by the court. The Court of Appeals shall review the findings and conclusions after remand as provided in this subsection.

5. Decision of Court of Appeals. (Added 47th Report, July 1, 1975)

The decision of the Court of Appeals is final. The decision is evidenced by the order of the Court of Appeals, which shall be certified under the seal of that Court by the Clerk and may be accompanied by an opinion. The record in the case shall be retained by the Clerk of the Court of Appeals.

MARYLAND RULES OF PROCEDURE

RULE BV12. RESIGNATION; DISBARMENT BY CONSENT.

a. WHERE FILED.

An application to resign from the practice of law in this State shall be submitted only to the Court of Appeals and must be in writing and state the reasons therefor. The submission of an application to resign does not prevent or stay disciplinary proceedings against the attorney, except as otherwise provided in Rule BV12 d.

b. PROCEDURE.

The Court of Appeals shall notify the Bar Counsel of the submission of an application to resign and may cause an investigation to be made by the Bar Counsel and hearings to be held in any court it deems appropriate. The Bar Counsel shall advise the Court of Appeals and forward to the Clerk of the Court of Appeals the record of any investigation or hearing, which shall be maintained as a permanent record of that Court.

c. EFFECT.

A resignation is effective only upon acceptance thereof by order of the Court of Appeals. Upon entry of an order accepting the resignation of an attorney, the provisions of Rule BV13 (Effect of Discipline, Resignation and Inactive Status) shall be complied with.

d. DISBARMENT BY CONSENT OF ATTORNEY UNDER INVESTIGATION.

1. Attorney May Not Resign.

An attorney may not resign while he is the subject of an investigation into, or pending proceedings involving allegations of his misconduct.

2. Requirements for Disbarment by Consent.

Upon the written recommendation of the Bar Counsel to the Court of Appeals, an attorney who is the subject of an investigation into, or pending proceedings involving allegations of his misconduct, may consent to disbarment, but only by delivering to the Bar Counsel and to the Court of Appeals an affidavit stating that he desires to consent to disbarment and that:

 COPYRIGHT, 1975

(i) His consent is freely and voluntarily rendered; he is not being subjected to coercion or duress; he is fully aware of the implications of submitting his consent; (Added 47th Report, 7/1/75)

(ii) He is aware that there is a pending investigation into or proceeding involving allegations of his misconduct, the nature of which he shall specifically set forth; and (Added 47th Report, 7/1/75)

(iii) He submits his consent because he knows that if charges were predicated upon the matters under investigation or if the proceedings were prosecuted, he could not successfully defend himself. (Added 47th Report, 7/1/75)

3. Effect.

After compietion of the requirements set forth in paragraph 2 of this subsection, the Court of Appeals may enter an order, signed by the Chief Judge or in his absence by an Associate Judge, disbarring the attorney by consent. Upon entry of an order disbarring an attorney by consent, the provisions of Rule BV13 (Effect of Discipline, Resignation and Inactive Status) shall apply.

RULE BV13. EFFECT OF DISCIPLINE, RESIGNATION AND INACTIVE STATUS. (Added 47th Report, 7/1/75)

a. STRIKING NAME FROM ROLLS.

When an order suspending or disbarring an attorney from the practice of law or placing him on inactive status has become final, or upon passage of an order accepting an attorney's resignation from the practice of law in this State, the Clerk of the Court of Appeals shall forthwith strike the name of the attorney from the register of attorneys in that Court, and certify that fact to the Trustees of the Clients' Security Trust Fund and the clerks of all judicial tribunals of the State.

b. EFFECT - NOT TO PRACTICE LAW.

An attorney may not practice law after the date of an order accepting his resignation or disbarring him or during the period of suspension or inactive status. Upon expiration of the period of his suspension specified in the order, an attorney may practice law only after filing with the Bar Counsel a verified statement that he has complied in all respects with the terms of the suspension.

MARYLAND RULES OF PROCEDURE

RULE BV14. TERMINATION - MODIFICATION - REINSTATEMENT.

a. PETITION - WHERE FILED.

A petition to modify or terminate a suspension or for termination of inactive status or for reinstatement shall be filed in the Court of Appeals.

b. CONTENT.

The petition shall set forth facts showing that the petitioner is rehabilitated and is otherwise entitled to the relief sought. The petition shall be verified. It shall also include a docket reference to all prior proceedings with respect to the charges.

c. SERVICE OF PETITION.

The petition shall be served on the Bar Counsel. The petition also shall be served in the manner the Court of Appeals directs upon the party who filed the charges and upon any other person designated by the Court of Appeals.

d. PROCEDURE.

1. Dismissal Without Hearing.

Upon receipt of a petition for reinstatement or for modification or termination of suspension or inactive status, the Court of Appeals may consider any written evidence submitted with the petition and the prior proceedings with respect to the charges and may dismiss the petition without a hearing or reserve judgment until after a hearing. The remaining provisions of this section do not apply if the petition is dismissed without a hearing.

2. Reservation of Judgment Pending Hearing.

If the Court of Appeals reserves judgment until after a hearing, the Bar Counsel shall conduct an appropriate investigation and shall refer the petition to an Inquiry Panel selected by the Chairman of the Inquiry Committee. Thereafter the petition shall be heard and determined by the Inquiry Panel in accordance with section c of Rule BV6 (Complaints and Investigations - Inquiry Panel Proceedings) and shall be reviewed by the Review Board in accordance with Rule BV7 (Review Procedure). The Bar Counsel shall transmit to the Court of Appeals the recommendations of the Review Board and any evidence.

MRP-502.13
COPYRIGHT, 1975

3. Subsequent Pleadings – Hearings – Disposition.

The provisions of section e of Rule BV9 (Charges - Pleadings), Rule BV10 (Hearing), and section b of Rule BV11 (Disposition of Charges Subsequent Proceedings) are applicable to proceedings instituted pursuant to this Rule.

4. Burden of Proof.

The burden if upon the petitioner to establish the averments of the petition by clear and convincing proof.

5. Conviction of Crime – Adjudication of Misconduct.

The provisions of section e of Rule BV10 (Hearing – Conviction of Crime – Adjudication of Misconduct), are applicable to proceedings instituted pursuant to this Rule.

e. REPLACING NAME ON ROLLS.

When an order reinstating an attorney after disbarment, resignation or inactive status, or reducing the period of his suspension, has become final, or upon the termination of the period of his suspension, the Clerk of the Court of Appeals shall replace the name of the attorney upon the register of attorneys in that Court and shall certify that fact to the Trustees of the Clients' Security Trust Fund and the clerks of all judicial tribunals in the State.

RULE BV15. COSTS.

a. GENERAL.

Except as provided in section b of this Rule, all court costs in proceedings under this Subtitle shall be paid by the State unless the Court of Appeals shall direct otherwise.

b. PROCEEDINGS UNDER RULE BV14.

In proceedings under Rule BV14 (Termination - Modification - Reinstatement), all court costs shall be paid by the attorney filing the petition, except to the extent that the Court of Appeals directs otherwise.

MARYLAND RULES OF PROCEDURE

c. JUDGMENT. (Effective July 1, 1975, 47th Report)

Costs of proceedings under this Subtitle shall be taxed by the Clerk of the Court of Appeals and included in the order as a judgment. The action of the Clerk may be reviewed by the Court of Appeals on motion. (Effective July 1, 1975, 47th Report)

d. BAD FAITH. (Effective July 1, 1975, 47th Report)

The provisions of section b of Rule 604 (Bad Faith - Unjustified Proceeding - Delay) apply to proceedings under this Subtitle. (Effective July 1, 1975, 47th Report)

RULE BV 16. SUSPENSION UPON CONVICTION OF CERTAIN CRIMES. (Effective February 20, 1975, 47th Report)

a. FILING CHARGES. (Effective February 20, 1975, 47th Report)

1. Application.

This Rule shall apply to convictions in any one or more of the following categories:

(i) in any Maryland court of a felony,

(ii) in any federal court of a felony, unless the same crime also is a crime under Maryland law and is not a felony,

(iii) in any other judicial tribunal of a crime which would have been a felony under Maryland law had the crime been committed in Maryland, and

(iv) in any judicial tribunal of any other cirme punishable by imprisonment for three years or more.

2. Duty of Bar Counsel - Evidence.

If an attorney is convicted of a crime to which this Rule is made applicable pursuant to Rule BV 16 a 1 ~~in any judicial tribunal of a crime involving moral turpitude,~~ whether the conviction results from a plea of guilty or of *nolo contendere* or from a verdict after trial, and regardless of the pendency of an appeal or any other post-conviction proceeding the Bar Counsel shall file charges with the Court of Appeals alleging the fact of the conviction and requesting that the attorney be suspended from the practice of law. A certified copy of the judgment of conviction shall be attached to the charges and shall be *prima facie* evidence of the fact that the attorney was convicted of the crime charged.

b. ORDER. (Effective February 20, 1975, 47th Report)

The Court of Appeals shall issue an order to show cause why the attorney should not be suspended from the practice of law until the further order of the Court of Appeals. Upon consideration of the charges and the answer to the order to show cause, the Court of Appeals may enter an order, effective immediately, suspending the attorney from the practice of law until its further order. The provisions of Rule BV13 apply to the suspension. (Effective February 20, 1975, 47th Report)

RULES SERVICE CO. COPYRIGHT, 1978 WASHINGTON, D. C.

MARYLAND RULES OF PROCEDURE

c. FURTHER PROCEEDINGS. (Effective February 20, 1975)

In any case in which the Court of Appeals has entered an order suspending an attorney until its further order, pursuant to this Rule, ~~a~~ further ~~hearing~~ proceedings on the charges shall be conducted pursuant to Rules BV9 (Charges), BV10 (Hearings) and BV11 (Disposition of Charges), to determine whether the crime warrants discipline and if so, the extent thereof. If the attorney has appealed from his conviction, the hearing shall be delayed until completion of the appellate process. If the conviction is reversed at any stage of the appellate process, the suspension shall be terminated. If after the completion of the appellate process, the conviction has not been reversed, or if the attorney does not seek appellate review of the conviction, the hearing shall be held within ~~30 days~~ a reasonable time after the mandate is issued, or, if no appellate review is sought, within 30 ~~days~~ a reasonable time after the expiration of the time for appeal from the conviction. However, if the attorney is incarcerated following termination of the appellate process or expiration of the time for an appeal (if no appeal has been taken), the hearing shall be set within ~~30 days~~ a reasonable time following termination of incarceration unless the attorney ~~(1)~~ (i) requests an earlier hearing; and ~~(2)~~ (ii) makes all arrangements, including financial arrangements, for his presence at the earlier hearing on the date set by the Court.

RULE BV 17. CONSERVATOR OF CLIENTS' AFFAIRS. (Effective February 20, 1975, 47th Report)

a. WHERE APPLICABLE. (Effective Feb. 20, 1975, 47th Report)

Whenever an attorney has been disbarred, suspended or placed on an inactive status or has disappeared, and no responsible party capable of conducting the affairs of the attorney is known to exist, the Bar Counsel may seek the appointment of a conservator. (Effective February 20, 1975, 47th Report)

b. PETITION AND ORDER. (Effective Feb. 20, 1975, 47th Report)

Any petition by the Bar Counsel for the appointment of a conservator under this Rule shall be filed in a court of equity in the county of the last office for the practice of law of the attorney whose affairs are the subject of the petition. Upon such proof of the facts as the court may require, the court may issue an order appointing the Bar Counsel or some other attorney as conservator to inventory the files of the disbarred, suspended, inactive or disappeared attorney and to take such action as seems indicated to protect the interests of his clients until the clients have had an opportunity to obtain substitute counsel. (Effective February 20, 1975, 47th Report)

RULES SERVICE CO. COPYRIGHT, 1975 WASHINGTON, D.C.

c. CONFIDENTIALITY.

Any attorney so appointed shall not be permitted to disclose any information contained in the files so inventoried without the consent of the client to whom the file relates, except as required to carry out the order of the court.

RULE BV 18. AUDIT OF ATTORNEY'S ACCOUNTS AND RECORDS.

a. APPLICATION FOR AUDIT.

Upon petition filed by (i) the Client's Security Trust Fund of the Bar of Maryland or (ii) the Bar Counsel, an equity court in the county where an attorney resides or has his principal office, may, after reasonable notice and upon a showing of good cause, order any of the accounts and records of an attorney required to be kept by law or Rule to be audited by a Certified Public Accountant designated by the court.

b. FORM OF APPLICATION AND NOTICE.

1. Titling of Case.

The proceeding shall be titled "In Re: Application of Audit of an Attorney's Accounts and Records".

2. Non-disclosure of Name.

The petition shall not divulge the name of the attorney against whom the petition is filed.

3. Show Cause Order.

Notice to the attorney shall be given by a show cause order which shall be served in such manner as the court may direct so as to preserve the confidentiality of the proceeding.

c. RECORDS - CLERK.

1. Dockets.

The clerk shall keep a separate docket with an index for proceedings under this Rule, which shall not be open to inspection by any person, including the parties, except upon an order of court for good cause shown.

MARYLAND RULES OF PROCEDURE

2. Sealing of Records.

The pleadings and other papers in the proceeding shall be sealed at the time they are filed, and shall not be open to inspection by any person, including the parties, except upon an order of court for good cause shown.

d. METHOD OF AUDIT – CONFIDENTIALITY.

The order directing the audit shall expressly require that the audit be conducted and a report be made in such manner as to preserve the confidential relation between the attorney and his clients.

e. COST OF AUDIT.

The court, in its discretion, may order the cost of the audit and of the proceeding to be paid in whole or in part by any party to the proceeding; provided, that the cost of the audit or of the proceeding or any part thereof shall not be assessed against the attorney in any case where the audit fails to disclose any irregularity.

f. FINALITY.

An order granting or denying the application is a final order.

g. OTHER PROCEEDINGS.

Nothing contained in this Rule nor the pendency of a proceeding hereunder shall preclude any person having an interest in a fund held by an attorney from pursuing any legal or equitable remedy or cause of action he may have with respect thereto.

Committee note. — See Md. Rule 1230 (Code of Professional Responsibility, DR9-102); Md. Code, Art. 10, §44; ~~Art. 21~~, §7-106, ~~(1973 Repl. Vol.)~~ Real Property Art.; and Andresen vs. Bar Assoc. of Montg. Co., 269 Md. 313, 305 A. 2d 845 (1973).

[Next Page is No. MRP-503]

 COPYRIGHT, 1978

Rule 1230. Code of Professional Responsibility.

The Code of Professional Responsibility of the American Bar Association, as set forth in Appendix F of the Maryland Rules, is hereby adopted.
(Added Oct. 13, 1970; amended Dec. 9, 1976, effective Jan. 1, 1977; Mar. 8, 1978, effective May 1, 1978.)

PETITIONER'S EXCEPTIONS IN COURT OF APPEALS

8. The failure to permit other witnesses called by the Respondent to testify.

9. The limitation on the number of character witnesses called by the Respondent.

10. The bias of Levin.

11. The prejudice of Levin.

12. Levin's inflammatory statements into the Record which have biased and prejudiced the case against the Respondent.

13. Levin's numerous statements into the Record of matters which were not in evidence in the case.

14. Levin's numerous statements into the Record concerning matters which had nothing to do with any charges made against the Respondent and which biased and prejudiced the case against the Respondent thereby.

15. Levin ignored the existence and receipt, as a matter of law, of the bill of January 16th which clearly set forth that the fee paid by Malcomb and the fee paid by Draper were each "retainer" fees, and thereby refuted any evidence that the arrangement in the cases was a "flat fee" arrangement; the January 16th bills were nowhere explained by Levin.

16. Levin's near-ludicrous analysis of the evidence as to the Malcomb fee, when the only amount that Malcomb had been requested to pay before the grievance was filed was a total of $1750; the evidence clearly shows that the requested incremental adjustment upward of those fees occurred in the course of an ordinary action at law and after a reexamination of the file indicated that on a time basis a higher fee was justified than had been originally charged. As a matter of law, there can be nothing untoward about a litigant adjusting his ad damnus, none of which was under oath, all of which were in the category of allegations in pleadings, and none of which would constitute any proof, let alone clear and convincing proof, as to any disciplinary charge made against the Respondent.

No. 80-854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEONARD J. KERPELMAN,

Petitioner,

v.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

HENRY J. MYERBERG
Assistant Bar Counsel
District Court Building
Taylor Avenue and Rowe Blvd.
Annapolis, Maryland 21401
Telephone: (301) 269-2791

M. PETER MOSER
ALAN I. BARON
1300 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Telephone: (301) 547-0500

January 26, 1981

The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED FOR REVIEW

Petitioner has set out approximately 19 questions which he contends are presented for review. Respondent respectfully suggests, however, that the only real issues are (1) *whether the evidence is sufficient to permit the State of Maryland to impose a two year suspension on an attorney for wilfull misrepresentations to a client and for knowingly advising another client to violate a court decree; and (2) whether this Court should consider imposing on the states a requirement, contrary to almost universal practice, that an attorney charged with misconduct must be accorded the right to a jury trial in disciplinary proceedings.*

Respondent submits that these are not issues which warrant a review by the Supreme Court. The issues present no conflict with any other state court decision and no important federal question which should be decided by this Court. See Supreme Court Rules 17.1 (b), 17.1 (c).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS	ix
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT:	
I. PETITIONER WAS NOT DENIED DUE PROCESS BY ANY PROCEDURES APPLIED IN THIS CASE	5
A. The Court Of Appeals Did Not Ignore Petitioner's Exception 15 Or Delegate Decision Making To A Single Judge So As To Deny Petitioner Due Process	6
B. The Maryland Attorney Disciplinary System Accords An Attorney Charged With Misconduct All Of The Due Process Rights Required By The Federal Constitution	7
1. The Maryland Rules governing attorney discipline (BV Rules) afford due process, including fair notice and an opportunity to be heard	8
2. Provision that hearings of formal charges shall not be stayed or delayed because of alleged procedural errors occurring *before* the charges are filed is not a denial of due process	10

PAGE

3. Provision that charges are heard by a designated judge in a "court" accords with the Maryland Constitution and does not violate any due process right 11

4. The appeal by way of exception affords procedural due process 13

C. The Manner Of Applying The Clear And Convincing Evidence Standard Of Proof In This Case Raises No Due Process Issue 13

D. Petitioner's Claimed Insufficiency In The Evidence Raises No Due Process Issues 15

II. PETITIONER WAS NOT DENIED DUE PROCESS OR EQUAL PROTECTION OF THE LAW BY VIRTUE OF BEING DISCIPLINED PURSUANT TO THE PROVISIONS OF THE ATTORNEY DISCIPLINARY RULES 16

III. THE DETERMINATION THAT PETITIONER HAD VIOLATED, *INTER ALIA*, DISCIPLINARY RULE 1-102(A)(6) BY COUNSELING A CLIENT TO SEIZE A CHILD IN KNOWING VIOLATION OF A COURT ORDER DID NOT DENY PETITIONER DUE PROCESS 17

IV. ASSESSMENT OF COSTS AGAINST PETITIONER BY THE MARYLAND COURT OF APPEALS, PURSUANT TO ITS ESTABLISHED RULES, DID NOT CONSTITUTE A BILL OF ATTAINDER, A FORFEITURE OR A DENIAL OF DUE PROCESS 19

PAGE

V. PETITIONER WAS NOT UNCONSTITUTIONALLY DEPRIVED OF ANY RIGHT TO TRIAL BY JURY BECAUSE NO SUCH RIGHT EXISTS IN AN ATTORNEY DISCIPLINARY PROCEEDING 21

VI. PETITIONER IS SUBJECT TO SANCTIONS FOR VIOLATION OF THE DISCIPLINARY RULES IN ADVISING A CLIENT TO ACT IN DIRECT CONTRAVENTION OF A VALID COURT ORDER 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Attorney Grievance Commission v. Bailey, 285 Md. 631, 403 A.2d 1261 (1979) 11

Attorney Grievance Commission v. Stewart, 285 Md. 251, 401 A.2d 1026 (1979), *cert. denied*, 444 U.S. 845 (1979), *rehearing denied* 444 U.S. 975 (1979) 11

Attorney Grievance Commission v. Walman, 280 Md. 453, 374 A.2d 354 (1977) 9

Attorney Grievance Commission v. Willcher, 287 Md. 74, 411 A.2d 83 (1980) 12

Balliet v. Baltimore County Bar Association, 259 Md. 474, 270 A.2d 465 (1970) 14

Bar Association v. Cockrell, 270 Md. 686, 313 A.2d 816 (1974) 9, 16

Bar Association v. Cockrell, 274 Md. 279, 334 A.2d 85 (1975) 9

Barsky v. Board of Regents, 347 U.S. 442, 74 S. Ct. 650, 98 L. Ed. 829 (1954) 13

	PAGE
Berkey v. Delia, 287 Md. 302, 413 A.2d 170 (1980)	14
Colten v. Kentucky, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972)	19
Emmons v. Smitt, 149 F.2d 869 (6th Cir. 1945), *cert. denied,* 326 U.S. 746 (1945)	8
Ex Parte Brounshall, 98 Eng. Rep. 1385 (K.B. 1778)	17
Ex Parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883)	17, 21
Iacaponi v. New Amsterdam Casualty Company, 258 F. Supp. 880, (W.D. Pa. 1966) *affd.*, 379 F.2d 311 (3d Cir. 1967), *cert. denied,* 389 U.S. 1054, 88 S. Ct. 802, 19 L. Ed. 2d 849 (1968)	22
In Re Cannon, 206 Wis. 374, 240 N.W. 441 (1932)	17
In Re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1947)	8
In Re Stump, 272 Ky. 593, 114 S.W.2d 1094 (1938)	17
Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972)	13
Maness v. Meyers, 419 U.S. 449, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975)	23, 24
Maryland State Bar Association v. Agnew, 271 Md. 543, 318 A.2d 811 (1974)	14
Maryland State Bar Association v. Sugarman, 273 Md. 306, 329 A.2d 1 (1974), *cert. denied,* 420 U.S. 974 (1975)	21
Meffert v. Packer, 66 Kan. 710, 72 Pac. 247 (1903), *affd. without opinion,* 195 U.S. 625 (1904)	21
Neblett v. Carpenter, 305 U.S. 297, 59 S. Ct. 170, 83 L. Ed. 182 (1938), *rehearing denied,* 305 U.S. 675 (1939)	8

PAGE

Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) 20

Office of the Disciplinary Counsel v. Campbell, 463 Pa. 472, 345 A.2d 616 (1975), *cert. denied*, 424 U.S. 926 (1976) 18

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978) 24

Olesen v. Trust Company of Chicago, 245 F.2d 522 (7th Cir. 1957), *cert. denied*, 355 U.S. 896, 78 S. Ct. 270, 2 L. Ed. 2d 193 (1957) 22

Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974) 19

Reese v. Mandel, 224 Md. 121, 167 A.2d 111 (1961) 20

Simon v. Craft, 182 U.S. 427, 21 S. Ct. 836, 45 L. Ed. 1165 (1901) 8

Smith v. Goguen, 415 U.S. 556, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974) 18

Spevak v. Klein, 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) 16, 21

Terrazas v. Vance, 577 F.2d 7 (7th Cir. 1978), *rev'd*, 444 U.S. 252, *rehearing denied*, 445 U.S. 920 (1980) 13, 14

United States v. National Dairy Products Corporation, 372 U.S. 29, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963) 19

United States v. United Mine Workers, 330 U.S. 258, 67 S. Ct. 677, 91 L. ed. 884 (1947) 23

Constitutional Provisions

Article 1, Section 10, Clause 1, United States Constitution 20

First Amendment, United States Constitution 23, 24

PAGE

Fifth Amendment, United States Constitution 21

Seventh Amendment, United States Constitution 21, 22

Fourteenth Amendment, United States Constitution 13, 22, 24

Declaration of Rights, Article 27, Maryland Constitution 9A Annotated Code of Maryland 111 (1977) 19

Article 4, Maryland Constitution, 9A Annotated Code of Maryland 230 (1977) 11, 12

Article 4, Section 18, Maryland Constitution, 9A Annotated Code of Maryland, Cumulative Supplement, 62 (1979) 12

Statutes

Article 10, Section 15, 1 Annotated Code of Maryland 359 (1976) 10

Maryland Laws, Chapter 305 (1977) 10

Statute of Westminster the First, 3 Edw. 1, C. 29 (1275) 16

Article 320a-1, Section 15(a), 1A Texas Civil Statutes, Annotated, Cumulative Pocket Part, 47 (1980) 22

Rules

Rule 17.1, Rules of the United States Supreme Court i

Rule 4-214, Rules and Regulations for the Organizations and Governments of the State Bar of Georgia (1977) 22

Rule 5, Maryland Rules of Procedure, Volume 9B, Annotated Code of Maryland 12

Rule 1230, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 2

PAGE

Rule BV 1F, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 12

Rule BV 6, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 9

Rule BV 7, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland ... 9

Rule BV 9, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 9, 10, 11

Rule BV 10, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 9, 10, 12, 14

Rule BV 11, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 10

Rule BV 15, Maryland Rules of Procedure, Volume 9C, Annotated Code of Maryland 19

Texts

30 Am. Jur. 2d, Evidence, Section 1167 14

6 Moore's Federal Practice, 54.70[2] 20

Problems and Recommendations in Disciplinary Enforcement, American Bar Association, Special Committee on Evaluation of Disciplinary Enforcement, Honorable Tom Clark, Chairman, June, 1970 22

Law Review Articles

Disbarment in the United States: Who shall do the noisome work? 12 Columbia Journal of Law and Social Problems 1 (1975) 16

Potts, *Disbarment Procedures,* 24 Tex. L. Rev. 161 (1946) 22

Potts, *Trial by Jury in Disbarment Proceedings,* 11 Tex. L. Rev. 28 (1932) 22

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

ARTICLE 4, SECTION 18, MARYLAND CONSTITUTION (in R.A. at 129)

ARTICLE 10, SECTION 15, ANNOTATED CODE OF MARYLAND

> Said charges shall be heard before two or more judges of the judicial circuit in which said court, wherein such charges have been filed, is located, and the accused attorney shall be afforded full opportunity to be heard and, unless the accused attorney shall in writing elect otherwise, all the testimony taken at said hearing shall be taken down by a stenographer and transcribed as in civil cases. Said hearing shall be governed by the rules of law, evidence and procedure of civil cases, so far as the same may be applicable thereto.

MARYLAND LAWS, 1977, CHAPTER 305 (in R.A. at 130-131)

STATUTE OF WESTMINSTER THE FIRST, 3 Edw. 1 c.29 (1275)

> It is provided also, That if any Serjeant, Pleader, or other, do any Manner of Deceit or Collusion in the King's Court, or consent unto it, in Deceit of the Court, or to beguile the Court, or the Party, and thereof be attained, he shall be imprisoned for a Year and a Day, and from thenceforth shall not be heard to plead in that Court for any Man . . .

ARTICLE 320 a-1, SECTION 15(a), 1A TEXAS CIVIL STATUTES ANNOTATED, CUMULATIVE POCKET PART, 47 (1980)

> The Supreme Court of Texas shall not adopt or promulgate any rule or regulation abrogating the right of trial by jury to either party to a disbarment action in the county of the residence of the accused attorney.

RULE 17.1, RULES OF THE UNITED STATES SUPREME COURT

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceeding, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

RULE 4-214, RULES AND REGULATIONS FOR THE ORGANIZATIONS AND GOVERNMENTS OF THE STATE BAR OF GEORGIA (1977)

Respondent attorney's right to trial by jury:

Special questions—

(a) In all cases the Respondent attorney shall have the right to have any material issues of fact determined by a jury in the Superior Court of a county of the member's residence, or in the case where the attorney is a non-resident, by a jury in the Superior Court selected under the provisions of Rule 4-221(c),

(b) The Respondent attorney shall move for trial by jury in writing, at or before the time his answer to the formal complaint is due, in the absence of a written motion the Respondent attorney will be deemed to have chosen to have all material issues of fact forwarded by the State Disciplinary Board,

(c) If the Respondent attorney shall have elected trial by jury the parties shall then frame separate special questions of fact to be submitted to the jury in the case of disagreement between the parties as to the form of the questions to be submitted the Superior Court judge shall frame questions based upon the pleadings and evidence at the time of trial.

RULE 5i, MARYLAND RULES OF PROCEDURE, Vol. 9B ANNOTATED CODE OF MARYLAND

"Court" means the Circuit Court for any county, the Superior Court of Baltimore City, the Court of Common Pleas of Baltimore City, the Baltimore City Court, the Circuit Court of Baltimore City, and the Circuit Court No. 2 of Baltimore City, Criminal Court of Baltimore, but not the Supreme Bench of Baltimore City or the District Court except as expressly otherwise provided, or may result from necessary implication. The word "court" shall include a court of law and a court of equity.

RULE 1230, MARYLAND RULES OF PROCEDURE, Vol. 9C ANNOTATED CODE OF MARYLAND (in R.A. at 160)

SUBTITLE BV, MARYLAND RULES OF PROCEDURE, Ch. 1100, DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS (in R.A. at 132-159)

No. 80-854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEONARD J. KERPELMAN,

Petitioner,

v.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" (Pet. at 3-10) fails to summarize the proceedings and is simply argument. Therefore, Respondent supplements Petitioner's Statement here.

The Trial Judge designated by the Court of Appeals, after about 30 days of evidentiary hearings and argument, found facts by clear and convincing evidence from which he concluded that Petitioner had violated DR 1-102(A) (1), (4), (5) and (6); DR 7-102(A) (7); and DR 7-106(A) of the Code of Professional Responsibility (CPR). After considering Petitioner's Exceptions, Bar Counsel's Exceptions and oral argument, the Court of Appeals agreed that the findings and conclusions made by the Trial Judge were

supported by clear and convincing evidence and suspended Petitioner from practice of law for two years.[1]

The Trial Judge and the Court of Appeals agreed that three separate violations of the CPR were proven by clear and convincing evidence. First, Petitioner represented to his client Malcomb that his total fee for the services in a child custody case would be $1,000 and no more, but maliciously escalated the fee (C.A. Op., P.S.A. at 5). Second, in order to justify an improper fee, Petitioner deliberately misrepresented to Malcomb that there remained more work to be done on his case and that Petitioner was working on it (C.A. Op., P.S.A. at 5). Third, Petitioner knowingly advised another client, Draper, to physically take his child from the child's mother, in violation of a court decree (C.A. Op., P.S.A. at 7).

The Trial Judge and the Court of Appeals also agreed that Petitioner's conduct violated certain Disciplinary Rules (DRs) of the CPR as alleged in the charges (C.A. Op., P.S.A. at 2; see n.1). In misrepresenting his fee to Malcomb, Petitioner violated DR 1-102(A) (4) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; DR 1-102(A) (5) by engaging in conduct prejudical to the administration of justice; DR 1-102(A) (6) by engaging in other conduct adversely reflecting on his fitness to practice law; and DR 1-102(A) (1), which states that a lawyer shall not violate a disciplinary rule (C.A. Op., P.S.A. at 5). Petitioner's misrepresentations to Malcomb that there was more work to be done and that he was doing it were similarly found to have violated DRs 1-102(A) (4) and 1-102(A) (6). Petitioner's advice to Draper

[1] The Trial Judge's Opinion (T. Op.) is reproduced in the Appendix to this Brief (R.A.) at 25-128. The Court of Appeals' Opinion (C.A. Op.), 288 Md. 341, 420 A.2d 940 (1980), is in Petitioner's Supplemental Appendix (P.S.A.), except the appendix to that Opinion. The appendix to C.A. Op. is in R.A. at 2-24. The CPR is made applicable to govern the conduct of attorneys in Maryland by Rule 1230 (R.A. at 160).

to get the child in knowing violation of a decree violated DRs 1-102(A) (1), 1-102(A) (4), 1-102(A) (5) and 1-102(A) (6), as well as DR 7-102(A) (4), 1-102(A) (5) and 1-102(A) (6), as well as DR 7-102(A) (7) (counseling a client in conduct known to be illegal or fraudulent) and DR 7-106(A) (advising a client to disregard a ruling of a tribunal) (C.A. Op., P.S.A. at 7, 18-20).

The Trial Judge dismissed other charges because he could not find clear and convincing evidence to sustain the DR violations. The Court of Appeals agreed. The dismissed violations charged Petitioner with violating DR 2-102(A) (2) by withholding Malcomb's papers after withdrawal of employment and continuing to deal with the judge in the case after discharge; with violations of DR 6-101(A) (2) in both the Malcomb and Draper cases by handling legal matters without adequate preparation; and with misrepresenting to Draper the amount of the fee which he would charge in the custody case (C.A. Op., P.S.A. at 5, 7).

In determining whether to impose disbarment or a lesser sanction, the Court of Appeals considered these factors: Petitioner's apparently unblemished prior professional record; that disciplinary proceedings are for protection of the public, and not for punishment; the nature of Petitioner's misconduct; and the effect of Petitioner's misconduct upon his client, upon the public and upon the administration of justice (P.S.A. at 20-21). The Court of Appeals specifically refused to consider an inference that the Draper case was not the only time Petitioner counseled a client to disregard a court order, noting that had this been properly charged and proven, the Court would have disbarred Petitioner (P.S.A. at 21).[2]

[2] Apparently, Mr. Kerpelman first admitted and then denied advising other clients to "violate court orders" (T. Op. at 64, C.A. Op., P.S.A. at 11, 19-20). The testimony of another of Mr. Kerpelman's clients, admitted solely on the issue of credibility, also supported the inference (C.A. Op., P.S.A. at 11).

SUMMARY OF ARGUMENT

I. Petitioner was afforded fair notice of all of the charges as well as a full evidentiary hearing and opportunity to controvert the charges. The Trial Judge, in an opinion carefully weighing all of the evidence, after considering oral argument and written briefs, concluded that some of the charges were supported by clear and convincing evidence, but that other charges were not. Having considered all of Petitioner's Exceptions, the Court of Appeals agreed with the findings and conclusions of the Trial Judge. On this record, there is manifestly no basis to find either that Petitioner was denied due process of law or that the Maryland Rules applicable to attorney disciplinary proceedings are constitutionally deficient in any respect.

II. Attorneys in this country and in England always have been recognized as performing a fundamental role in the administration of justice. Unquestionably there is a rational basis for providing attorney disciplinary procedures applicable solely to lawyers without violating their equal protection or due process rights.

III. When a lawyer is clearly charged with making wilfull misrepresentations to one client and with knowingly counseling another to violate a court order, no basis exists for a claim that one of several disciplinary rules violated by the misconduct is unconstitutionally vague. Here, Petitioner had fair notice that his specified conduct was prohibited by DR 1-102(A) (6) ("conduct that adversely reflects on his fitness to practice law"), and he cannot attack the Rule simply because, on other facts, it might not afford a lawyer fair notice of the charges.

IV. Because costs of the proceedings were assessed against Petitioner pursuant to Rule as a part of established judicial process, no basis exists for a claim that this

action is a "bill of attainder" or "forfeiture" or denies him due process.

V. The constitutional right to a jury trial never has been accorded lawyers charged with misconduct in disciplinary proceedings. This Court should not consider imposing such a constitutional requirement on the states because to do so would seriously disserve the public.

VI. No First Amendment free speech rights are violated where a state high court disciplines a lawyer for counseling his client to seize a child in knowing disregard of a court decree and in clear violation of a disciplinary rule, where disregarding the court order is not necessary to protect any constitutional right.

ARGUMENT

I.

PETITIONER WAS NOT DENIED DUE PROCESS BY ANY PROCEDURES APPLIED IN THIS CASE.

(Petitioner's Questions I.A., I.B.1, I.B.2., I.B.3., I.B.5., I.D., I.E., I.F., I.G. and I.H.)

Petitioner's broadside due process attack can be considered under four general categories: (A) alleged defects in the review by the Court of Appeals in his case (Question I.A.); (B) claimed denial of due process as a result of certain features of the Maryland Rules relating to attorney discipline (Questions I.B.1., I.B.2., I.B.3., I.B.5., I.D. and I.E.); (C) asserted misapplication of the clear and convincing evidence standard (Questions I.B.4. and I.C.); and (D) insufficiency in evidence to prove some of the findings and conclusions upheld by the Court of Appeals (Questions I.F., I.G. and I.H.).[3]

[3] The claimed due process violation in applying the disciplinary procedures to practicing attorneys only (part of Question I.B.1.) is considered in Part II, along with asserted denial of equal protection. Petitioner's allegations that DR 1-102(A) (6) is

A. THE COURT OF APPEALS DID NOT IGNORE PETITIONER'S EXCEPTION 15 OR DELEGATE DECISION MAKING TO A SINGLE JUDGE SO AS TO DENY PETITIONER DUE PROCESS.

(Petitioner's Question I.A.; argued in Pet. at 7-8, 10-17)

Petitioner argues that the Court of Appeals did not rule on an "important exception" (Exception 15) to the Trial Judge's findings. Petitioner then makes the bootstrap argument that for this reason the Court of Appeals must have improperly delegated its "justiciating function" to the single judge who wrote the opinion. Petitioner's assertions are without merit mainly because the Court of Appeals specifically ruled in Exception 15 and denied reconsideration when Petitioner claimed that the Court had not ruled on it.

Petitioner's Exception 15 (Pet. at 6A; R.A. at 161) alleges that the initial fee agreement with Malcomb was for a $1,000 retainer plus additional fees at a later time, rather than for a $1,000 flat fee. Petitioner says the Court of Appeals failed to consider his Exception 15 based solely on the fact that the Court grouped Exception 15 with the six other exceptions to facilitate its rulings, stating:

> 10-16 inclusive — Alleged bias, prejudice, etc., of Judge Levin.
>
> These contentions are without merit (P.S.A. at 10).

Respondent is aware of no principle of law which requires a court to address every worthless contention raised by a party. Moreover, it is clear that the Court ruled on Exception 15. Petitioner grouped Exception 15 in the midst of six other exceptions (10-16, R.A. at 161). All seven exceptions relate to "Levin's" (the Trial Judge's)

---

unconstitutionally vague (Question I.I.) is discussed in Part III. Petitioner's claim that his being required to pay court costs is a "forfeiture" (Question I.J.) is addressed in Part IV.

"bias" (10), "Prejudice" (11), "inflammatory statements" (12), "statements . . . of matters . . . not in evidence" (13), "statements . . . concerning . . . matters which had nothing to do with any charges . . . and which biased and prejudiced the case" (14), ignoring "the existence and receipt . . . of the bill of January 16th. . .", which was "nowhere explained" (15)[4], and "near-ludicrous analysis of the evidence as to the Malcomb fee" (16). Petitioner obviously intended all these exceptions to support his frivolous and repeated charges that the Trial Judge was prejudiced — charges which the Court of Appeals considered and rejected as being "without merit" (P.S.A. at 10; see also P.S.A. at 12, 18).

Since the Court in fact ruled on Exception 15 in an opinion joined by all seven judges (P.S.A. at 2), there is no inference "from the fact that not one of the seven appeals court judges seems to have noticed the failure to rule on Exception 15" to support the claim of improper delegation of the "justiciating function" (Pet. at 17).

B. The Maryland Attorney Disciplinary System Accords An Attorney Charged With Misconduct All Of The Due Process Rights Required By The Federal Constitution.

(Petitioner's Questions I.B.1.-3., 5.; I.D., I.E.; argued in Pet. at 18-29)

Petitioner claims that he has been denied due process because the Court of Appeals has created a "new type of court proceeding" with these features: absence of checks or

[4] Contrary to Petitioner's assertion, the Trial Judge specifically considered the January 16th bill in his opinion (T. Op., R.A. at 87). The Trial Judge found: "I believe him [Malcomb] when he denied receiving any January 16, 1976 bill ('Further Retainer') . . . . Here Malcomb was in court, he underwent a blistering and humiliating cross-examination by respondent [Kerpelman] and maintained his composure and credibility" (Tr. Op., R.A. at 89; see also 85).

balances and "elemental" due process safeguards; provision that an attorney may not take advantage of procedural errors; reference of fact-finding functions to a master; establishment of a special court in usurpation of a right reserved to the people by Maryland Constitution, Article IV; and allowance of an appeal only by way of exceptions, which he claims is arbitrary and limited (Pet. at ii.-iv.). Petitioner cites no relevant authorities for these propositions and there are none. Neither does he explain how the asserted defects unconstitutionally prejudiced him or would prejudice any other attorney, because they do not.[5]

1. *The Maryland Rules governing attorney discipline (BV Rules) afford due process, including fair notice and an opportunity to be heard.*

It is clear that the license of an attorney to practice law must not be arbitrarily terminated or adversely affected without according procedural due process. *In re Oliver*, 333 U.S. 257 (1947). The essential elements of procedural due process are fair notice of the charges and an opportunity to be heard. *Simon v. Craft*, 182 U.S. 427, 436 (1901). The BV Rules amply afford these rights to an attorney accused of misconduct.

Before any complaint reaches the stage where formal public charges are filed, the facts alleged must be investigated, presented to an Inquiry Panel for hearing

[5] To the extent that Petitioner argues that the Court in adopting the BV Rules misconstrued the Maryland Constitution and laws, such misconstruction would not be a denial of due process. Construing state constitutions, laws and rules are state questions left to the determination of state courts. *E.g., Neblett v. Carpenter*, 305 U.S. 297 (1938), rehearing den., 305 U.S. 675 (1939) (no denial of due process by state court having allegedly construed a state law incorrectly); *Emmons v. Smitt*, 149 F.2d 869 (6th Cir. 1945), *cert. den.*, 326 U.S. 746 (1945) (no federal jurisdiction to entertain an attack on state legislation or state activity as in violation of the state constitution if no substantial federal question presented).

and reviewed by the Rev. w Board.[6] Notice of the nature of the complaint is a prerequisite (Rule BV 6a4). No action other than dismissal of the complaint may be taken, unless the attorney is given an opportunity to examine and controvert the complaint and be represented by counsel (Rule BV 6d). The attorney can depose witnesses who cannot appear (Rule BV 6d3) and summons witnesses and documents (Rule BV 6d3(c)).

Bar Counsel files charges against an attorney *only* at the direction of the Review Board after the Board has reviewed the case (Rules BV 7b, BV 9a). The charges, which are filed in the Court of Appeals, must be ". . . sufficiently clear and specific reasonably to inform the attorney . . . of any misconduct charged . . ." Rules BV 9b, BV 9c; see also *Bar Association v. Cockrell,* 270 Md. 686, 692 (1974) (charges must be sufficiently clear and specific to make the attorney aware of what he is compelled to answer for and defend against).[7]

The Court of Appeals transmits the charges for a hearing in any court within the State and designates the judge or judges to hear the charges (Rule BV 9b, BV 10c).[8]

[6] Rules BV 6 (Complaints and Investigations) and BV 7 (Review Procedure). The Maryland BV Rules are at R.A. 132-59. A hearing may be waived, and none is required where the attorney has been convicted of a serious crime or has been found guilty of misconduct by another court. Rule BV 6b. However, not even a private reprimand may be administered if the attorney requests a trial of formal charges by a court (Rule BV 7c).

[7] This requirement is strictly applied. See *Bar Association v. Cockrell,* 274 Md. 279, 284-287 (1975); *Attorney Grievance Commission v. Walman,* 280 Md. 453, 463-464 (1977) (attorney's failure to file Maryland income tax returns, disclosed for the first time at a hearing on other charges, could not be used to justify a more severe sanction than that called for by the specified charges).

[8] Petitioner prints an earlier version of Rule BV 10c (Pet. at 15A). Rule BV 10c, as amended September 22, 1978 (R.A. at [49]), calls for a hearing by one judge provided, upon petition by the attorney or the Commission "for good cause shown or on its

The attorney is served with the charges and may seek transfer to another court (Rules BV 9d, 9e1). Full discovery is accorded (Rule BV 10a). "The hearing of charges is governed by the same rules of law, evidence and procedure as are applicable to the trial of civil proceedings in equity" (Rule BV 10d).

Following the evidentiary hearing, the assigned judge files written findings of fact and conclusions of law (Rule BV 11a); the record goes to the Court of Appeals (Rule BV 11b1); the attorney charged and Bar Counsel each may file exceptions and answers to any exceptions filed by the other (Rule BV 11b2); and the case is argued in the Court of Appeals (Rule BV 11b3, 4, 5).

Respondent respectfully submits that these procedures assure an attorney charged with misconduct many more procedural rights and safeguards than due process requires.

2. *Provision that hearings of formal charges shall not be stayed or delayed because of alleged procedural errors occurring* before *the charges are filed is not a denial of due process.*

Petitioner asserts "that no 'procedural' errors may be taken advantage of by the defendant (BV 10b)" (Pet. at ii, 27), another claimed denial of due process. However, Rule BV 10b states only: "The hearing of charges shall *not be stayed or challenged* by reason of any procedural defects *alleged to have occurred prior to the filing of charges*" (R.A. at 149, emphasis added). Prior to the filing of formal charges in the Court of Appeals, the proceedings on

---

own motion the Court may designate two additional judges to consider the charges" (R.A. at 149). Petitioner also asserts a violation of due process because of a claimed conflict between this procedure and that specified in Maryland Ann. Code, Art. 10, § 15. However, § 15 was repealed effective July 1, 1977 (Md. Laws, Ch. 305, 1977, R.A. at 130-31).

complaints against attorneys are similar to grand jury proceedings, are investigatory in nature and are for the purpose of determining whether to institute disciplinary action. *Attorney Grievance Commission v. Stewart,* 285 Md. 251, 259 (1979), *cert. den.,* 444 U.S. 845 (1979) rehearing den., 444 U.S. 975 (1979). Formal charges of misconduct do not exist against an attorney until the charges are filed in the Court of Appeals. *Attorney Grievance Commission v. Bailey,* 285 Md. 631, 637 (1979).

Moreover, Petitioner cites no instance where his due process rights were violated at these earlier proceedings. His claim that the mere existence of Rule 10b somehow denies him due process is without merit.

3. *Provision that charges are heard by a designated judge in a "court" accords with the Maryland Constitution and does not violate any due process right.*

Petitioner asserts that the procedure for the hearing of charges violates his due process rights in two ways. First, that this establishes a new court not provided for in the Maryland Constitution, in usurpation of the powers reserved to the people by the Maryland Constitution, Article IV (Pet. at 22). Second, that this amounts to an unconstitutional "Non-Consensual Reference to a Master" (Pet. at 18). The Court of Appeals considered and rejected these or similar assertions (P.S.A. at 16, 17).[9] Petitioner's assertions are meritless even assuming that Federal due process issues are involved.

The charges are heard in a "court" by a "judge or judges" (Rule BV 9b). The term "court" is defined as "the location where the judge or judges will conduct the hearing and includes the Supreme Bench of Baltimore City" (Rule BV

[9] Petitioner seems to have asserted below *only* that the procedure involved usurpation of the *legislative* power.

1f).[10] The "court" referred to is one created pursuant to the provisions of Article IV of the Constitution.

Moreover, the provisions of Maryland Constitution, Article IV, authorizes the Court of Appeals to make procedural rules (§ 18, R.A. at 129). The BV Rules are procedural rules promulgated pursuant to Section 18. Accordingly, there has been no proceeding adopted in violation of Article IV or any usurpation of rights guaranteed thereby to the people, as Petitioner asserts.

It is perfectly proper for a court to refer cases to masters to hear the evidence, as the Court of Appeals notes in dismissing the contention of Petitioner that this is improper (P.S.A. at 16). Moreover, although the "hearing judge's findings have a force and effect similar to those in a master's report in equity," *e.g., Attorney Grievance Commission v. Willcher,* 287 Md. 74, 77 (1980), the "hearing of the charges is governed by the same rules of law, evidence and procedure" as apply in an equity trial (BV 10d). Thus the attorney is accorded a trial before a judge with all requisite due process protections. See also, Section I.A.2., *supra.* No authority suggests any due process requirement that an attorney consent to have charges of misconduct tried by this procedure. For these reasons Petitioner's argument that reference to a master amounts to a denial of due process is without merit.

[10] Maryland Rule 5 (General Definitions) also defines the term: " 'Court' means the Circuit Court for any county, the Superior Court of Baltimore City, the Court of Common Pleas of Baltimore City, the Baltimore City Court, the Circuit Court of Baltimore City and the Circuit Court No. 2 of Baltimore City, a Criminal Court of Baltimore, but not the Supreme Bench of Baltimore City or the District Court except as expressly otherwise provided, or may result from necessary implication . . ." (Rule 5i).

4. *The appeal by way of exception accords procedural due process.*

There is equally no merit in Petitioner's claim that an appeal by way of exceptions is "not a due process appeal but is arbitrary and limited" (Pet. at iii). First, a right of appeal is not even a prerequisite of procedural due process if a full and fair trial on the merits is provided. *E.g., Lindsey v. Normet,* 405 U.S. 56, 77 (1972); see also *Barsky v. Board of Regents,* 347 U.S. 442, 470 (1954) (Frankfurter, J., dissenting, recognizes that not even judicial review is a requirement in proceedings to suspend or revoke a physician's license). Second, the Court of Appeals makes it clear that the standard of review of a trial judge's findings and conclusions in attorney disciplinary cases is essentially the same "clearly erroneous" standard of review which applies in cases where a judge hears a case without a jury (P.S.A. at 7).

C. The Manner Of Applying The Clear And Convincing Evidence Standard Of proof In This Case Raises No Due Process Issue.

(Petitioner's Questions I.B.4. and I.C.; argued in Pet. at 30-36)

Petitioner alleges that he was denied due process by the manner of application of the clear and convincing evidence standard of proof. His only authority is a case that was reversed, *Terrazas v. Vance,* 577 F.2d 7 (7th Cir. 1978), *rev'd.,* 444 U.S. 252, *rehearing den.,* 445 U.S. 920 (1980). The Seventh Circuit had ruled that when U.S. citizenship was at stake, the Fourteenth Amendment required application of a clear and convincing test to prove voluntary relinquishment of citizenship rather than the preponderance test provided by Congress. The Supreme Court reversed and held that the clear and convincing evidence standard was not constitutionally compelled. Noting that it had previously recognized the importance of citizenship

and a decided preference for requiring clear and convincing evidence to prove expatriation, the Supreme Court reasoned that, unlike criminal and involuntary commitment cases, "expatriation proceedings are civil in nature and do not threaten a loss of liberty." 444 U.S. at 266.

The same reasoning applies where an attorney faces sanction for misconduct. Disciplinary proceedings do not threaten the loss of liberty. Neither are they criminal proceedings. *E.g., Balliet v. Baltimore County Bar Association,* 259 Md. 474, 478 (1970). Disciplinary proceedings are for the purposes of maintaining the integrity of the bar and to protect the public, not for punishment. *E.g., Maryland State Bar Association v. Agnew,* 271 Md. 543, 549 (1974). Accordingly, the courts or legislatures *could* provide for a preponderance standard of proof of misconduct by an attorney. Therefore, no due process question is raised even had the clear and convincing test not been applied in this case.

However, the clear and convincing standard was applied properly in this case, as required by the Maryland Rules (Rule BV 10d). This standard is defined by the Court of Appeals as being more than a preponderance of the evidence and less than evidence beyond a reasonable doubt, *Berkey v. Delia,* 287 Md. 302, 319-20 (1980). In *Berkey,* the Maryland Court explains that the requirement of clear and convincing evidence does not call for unanswerable or conclusive evidence:

> "Whether evidence is clear and convincing requires weighing, comparing, testing and judging its worth when considered in connection with all the facts and circumstances in evidence."

287 Md. at 320, quoting from 30 Am. Jur. 2d., Evidence § 1167.

The application of this test here resulted in rulings in Petitioner's favor with regard to some of the charges brought against him by the Commission, as well as rulings against Petitioner. See Statement of the Case, *supra*; T. Op., R.A. at 52-53, 60; C.A. Op., P.S.A. at 5, 7.

Moreover, Petitioner's argument that the clear and convincing standard was misapplied by the Trial Judge (Pet. at 32-35, 37-38) raises no more than a credibility issue and has nothing to do with due process. Petitioner is saying that the Trial Judge should have believed him and not Malcomb. The lengthy analysis of the evidence by the Trial Judge (R.A. 73-105) makes it clear that the proper weighing, comparing, testing and judging the worth of the evidence was applied. See also discussion by the Court of Appeals of (i) the proof in the Malcomb matter (P.S.A. at 10), and (ii) Bar Counsel's Exceptions (P.S.A. at 7-8).

D. Petitioner's Claimed Insufficiency In The Evidence Raises No Due Process Issues.

(Petitioner's Questions I.F., I.G. and I.H.; argued in Pet. at 32-35, 38; 29A-29B)

Petitioner argues that any ambiguities in the evidence relating to the Malcomb charges should have been resolved in his favor because all issues revolved around a "word against word confrontation" between Petitioner and Malcomb. Petitioner also asserts that the Malcomb case involved "a bona fide fee dispute only" (Pet. at iv), merely stating the question but not arguing the point. These also are credibility issues, not due process questions, and have been fully resolved by the Trial Judge (R.A. at 73-105) and by the Court of Appeals (P.S.A. at 14-15; see also 3-5).

Petitioner claims that the Court of Appeals adopted and relied on an unwarranted inference that in other instances, not part of the charges, Petitioner had advised clients to violate court orders. This misstates what the

Court of Appeals did. While the inference about which Petitioner complains *is* readily inferrable from the evidence (see P.S.A. at 11), the Court applied the due process requirements of notice and opportunity to be heard and specifically held "such other instances may not be used in determining the sanctions, [Petitioner] not having been charged with them," citing *Bar Association v. Cockrell,* 270 Md. 686 (1974) (P.S.A. at 21). See *supra,* n.7.

II.

PETITIONER WAS NOT DENIED DUE PROCESS OR EQUAL PROTECTION OF THE LAW BY VIRTUE OF BEING DISCIPLINED PURSUANT TO THE PROVISIONS OF THE ATTORNEY DISCIPLINARY RULES.

(Petitioner's Question 1.B.1. and II.; not argued)

Petitioner alleges that he was denied equal protection only in his statement of "Questions Presented for Review" (Pet. at v.). Petitioner apparently did not intend to elicit an answer to his question because he does not argue the point. He also asserts a due process objection to the Disciplinary Rules as a "proceeding . . . applicable to practicing attorneys only" (Pet. at ii.).

However, assuming an equal protection (or due process) issue is presented, it is without merit. An accepted principle in this country and in England is that "lawyers are officers of the Court who perform a fundamental role in the administration of justice." *Spevack v. Klein,* 358 U.S. 511, 524 (1967) (Fortas, J. concurring). As early as the Thirteenth Century, it was recognized that "the judiciary had the inherent power to regulate legal practitioners. . . ." *Disbarment in the United States: Who Shall Do the Noisome Work*? (hereafter "Disbarment"), 12 Col. J. of Law and Social Problems 1, 4 (1975), citing the Statute of Westminster the First, 3 Edw. 1, C. 29 (1275). This principle is today recognized in almost every state. See *Disbarment, supra,* at 8.

Moreover, as an officer of the court, the attorney has traditionally been held to higher standards of conduct than laymen. As stated by Lord Mansfield in *Ex Parte Brounshall,* 98 Eng. Rep. 1385 (K.B. 1778) "[T]he question is, whether after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion." See also *Ex Parte Wall,* 107 U.S. 265 (1883); *In re Stump,* 272 Ky. 593, 598 (1938); *In re Cannon,* 206 Wis. 374, 383 (1932). The lawyer's role as an officer of the court and his responsibility in the administration of justice has thus long been seen as subjecting the attorney to disciplinary proceedings relative to his professional status.

Petitioner's cryptic question suggests that it is somehow unconstitutional for a state to provide for disciplinary proceedings particularly applicable to lawyers. This notion flies in the face of nearly 700 years of English and American history, as well as the practice of virtually every state in the nation.

III.

THE DETERMINATION THAT PETITIONER HAD VIOLATED, *INTER ALIA,* DISCIPLINARY RULE 1-102(A) (6) BY COUNSELING A CLIENT TO SEIZE A CHILD IN KNOWING VIOLATION OF A COURT ORDER DID NOT DENY PETITIONER DUE PROCESS.

(Petitioner's Question I.I.; argued in Pet. at 36, 41)

Petitioner asserts that the finding that he violated Disciplinary Rule 1-102(A) (6) was improper in that he thereby "has been found guilty of an overbroad charge (P. 38, Opinion) which informed him of nothing concerning what it was he had to meet." (Pet. at 41). He alleges that "the charges were neither further defined, nor restricted by the facts in the case, in any way that is discernible in the opinion" (*ibid.*).

A reading of the Court of Appeals opinion establishes that Petitioner has failed to read or has misread the opinion. The conclusion that Mr. Kerpelman violated DR 1-102(A) (6) came at the end of a section of the Court's opinion captioned "Legal effect of counseling violation of a court decree" (P.S.A. at 18-20). It is clear that what is referred to is the *factual* finding that Mr. Kerpelman had counseled his client, Draper, to seize a child in violation of a valid court order (see discussion at C.A. Op., P.S.A. at 5-7). After several pages of factual and legal analysis, the Court of Appeals specifically states that it was "Kerpelman's conduct in the matter of the child" which amounted to a violation of DRs 1-102(A) (1), (4), (5), and (6), as well as DRs 7-102(A) (7) and 7-106(A). (See P.S.A. at 20).

To the extent that Mr. Kerpelman suggests that DR 1-102(A) (6) is itself too vague, his point is without merit, at least as applied to the particular conduct in which he engaged — counseling a client to violate a court order by child snatching. A similar argument was made in *Office of the Disciplinary Counsel v. Campbell,* 463 Pa. 472, 345 A.2d 616 (1975), *cert. den.,* 424 U.S. 926 (1976), where Campbell was charged with specific misconduct in violation of six DRs, 1-102(A) (3), (4), (5), (6), 7-102(A) (7), and 9-101(C). The Court said "all but two of these rules specify with great clarity the conduct prohibited." 345 A.2d at 621. The two exceptions were DRs 1-102(A) (5) and (6). The Court continued:

> Although these two rules are arguably vague, it does not necessarily follow that appellant's disbarment under these sections is constitutionally impermissible. A regulation or statute can be validly applied to some activities even though its application to other situations might be of uncertain constitutionality. *Smith v. Goguen,* 415 U.S. 556, 578, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974). Where one is on fair notice that his own conduct is within that prohibited by a regulation, he cannot attack the regulation simply

> "because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit." *Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 2563, 41 L. Ed. 2d 439 (1974). See also *Colten v. Kentucky*, 407 U.S. 104, 109-10, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972); and *United States v. National Dairy Products Corp.*, 372 U.S. 29, 31-32, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963). 345 A.2d at 621.

The Maryland Court of Appeals decided on the basis of clear and convincing evidence that Mr. Kerpelman violated DR 1-102(A) (6) because he counseled a client to seize a child in knowing violation of an outstanding court order. There is no vagueness in the Disciplinary Rules as applied in this or the other charges in his case because he had fair notice of the facts. Accordingly, this claim by Petitioner also is without merit.

IV.

ASSESSMENT OF COSTS AGAINST PETITIONER BY THE MARYLAND COURT OF APPEALS, PURSUANT TO ITS ESTABLISHED RULES, DID NOT CONSTITUTE A BILL OF ATTAINDER, A FORFEITURE OR A DENIAL OF DUE PROCESS.

(Petitioner's Question I.J.; argued in Pet. at 36, 42)

The Court of Appeals, pursuant Rules BV 15a. and BV 15c. (R.A. at 155, 156), ordered Petitioner to pay all costs of the proceedings, including the costs of all transcripts. The Court also ordered that Petitioner's suspension from the practice of law would not be terminated unless all costs were paid in full (P.S.A. at 21). Petitioner apparently contends that these actions by the Court constitute a bill of attainder, seemingly because costs were imposed pursuant to the Court's rules and not by statute. He further suggests that the imposition of costs is a "forfeiture" in violation of Article 27 of the Maryland Declaration of Rights (Pet. at 16A).

The power of the courts to assess costs is recognized under both English and American law. See discussion in 6 *Moore's Federal Practice,* 54.70[2] at 1302-03. Court costs are in the nature of incidental damages to reimburse the prevailing party for certain expenses involved in the assertion or defense of his rights in court. Imposition of court costs is not a punishment. See *e.g., Reese v. Mandel,* 224 Md. 121, 130 (1961).

Petitioner's argument that the imposition of costs by the Court is an unconstitutional bill of attainder is unfounded. Article I, § 10, clause 1 of the United States Constitution provides in pertinent part: "No state shall . . . pass any Bill of Attainder." The term "bill of attainder" has been defined to mean "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services,* 433 U.S. 425, 468 (1977). Thus, what is prohibited by the bill of attainder clause is in essence legislative punishment. There was no punishment here because the imposition of costs is not a penalty. Moreover, the costs were imposed by virtue of the judicial process, and not by any legislative act. Whatever Petitioner may be alleging, he can hardly claim that he has been denied a judicial trial. The assertion that this is a "forfeiture" in violation of the Maryland Constitution is not a federal question. See *supra,* n.5.

For these reasons, Petitioner's claim that the imposition of costs is unconstitutional is without merit.

V.

PETITIONER WAS NOT UNCONSTITUTIONALLY DEPRIVED OF ANY RIGHT TO TRIAL BY JURY BECAUSE NO SUCH RIGHT EXISTS IN AN ATTORNEY DISCIPLINARY PROCEEDING.

(Petitioner's Question III; argued in Pet. at 38-41)

The sole authority for Petitioner's Fifth Amendment argument that he is entitled to a jury trial is *Spevack v. Klein,* 385 U.S. 511 (1967). That case, in a plurality opinion, held only that a lawyer could not be disbarred for invoking the privilege against self-incrimination where his answers allegedly might have incriminated him. The Court did not say that a disciplinary proceeding was a criminal proceeding, and the decision does not hold or suggest that an attorney under these circumstances has the constitutional right to a trial by jury.

However, in *Ex Parte Wall,* 107 U.S. 265, 288 (1883), a case directly on point, the Court held that "the constitutional privilege of trial by jury for crimes does not apply to prevent the courts from punishing its officers for contempt, or from removing them in proper cases." See also *Meffert v. Packer,* 66 Kan. 710, 72 Pac. 247 (1903), *affd. without op.,* 195 U.S. 625 (1904) (due process does not require a court proceeding in revoking a physician's license); *Maryland State Bar Assn. v Sugarman,* 273 Md. 306, 318 (1974), *cert. den.,* 420 U.S. 974 (1975) (disbarment "is intended not as a punishment, but as protection to the public" and concluding, *inter alia,* an attorney disciplinary proceeding is not a criminal case within the purview of the Fifth Amendment); and C.A. Op., P.S.A. at 8-9 (where Petitioner's asserted right to a jury trial is considered).

Petitioner alternatively contends that he has been deprived of his rights under the Seventh Amendment to the United States Constitution in that his disciplinary proceeding was a "suit at common law, where the value in controversy . . . exceed[s] Twenty Dollars . . .". Peti-

tioner concedes that this argument turns on the willingness of the Court to rule that the Seventh Amendment right to civil jury trials is made applicable to the states by the Fourteenth Amendment. The Supreme Court has never so held, and several lower courts have held to the contrary. See, *e.g., Olesen v. Trust Co. of Chicago,* 245 F.2d 522 (6th Cir. 1957), *cert. den.,* 355 U.S. 896; *Iacaponi v. New Amsterdam Cas. Co.,* 258 F. Supp. 880 (D.C. Pa. 1966), affd., 379 F.2d 311 (3d Cir. 1967), *cert. den.,* 389 U.S. 1954 (1968).

Elevating the right of an attorney to a jury trial in disciplinary proceedings to the status of a constitutional requirement would serve only to weaken effective disciplinary enforcement by creating interminable delays.[11]

For all of these reasons, Petitioner's claim that he was unconstitutionally deprived of his right to jury trial does not present an issue which warrants the issuance of a writ of certiorari.

---

[11] Only two states now permit jury trials in their attorney disciplinary proceedings. Texas Civ. Stat. Ann. art. 320a-1, § 15(a) (1980); Rules and Regulations For The Organizations and Governments of State Bar of Georgia, R. 4-214 (1977). The practice is rarely used and where it is optional has served only to delay the proceedings. See Problems and Recommendations in Disciplinary Enforcement (ABA Special Committee on Evaluation of Disciplinary Enforcement, Hon. Tom C. Clark, Chairman, June, 1970) 136-137. The Clark Committee condemned the use of jury trials in attorney disciplinary proceedings, as have other commentators. See *e.g.,* Potts, Disbarment Procedure, 24 Tex. L. Rev. 161, 169 (1946); Potts, Trial By Jury in Disbarment Proceedings, 11 Tex. L. Rev. 28, 51 (1932).

VI.

PETITIONER IS SUBJECT TO SANCTIONS FOR VIOLATION OF THE DISCIPLINARY RULES IN ADVISING A CLIENT TO ACT IN DIRECT CONTRAVENTION OF A VALID COURT ORDER.

(Petitioner's Question IV.; argued in Pet. at 43-47)

It has long been recognized that orders and judgments of courts are to be complied with. The remedy for those who disagree with any court order is to appeal or to seek judicial reconsideration. Even if a court order is ultimately ruled incorrect, persons who make a private determination of the law in disregard of a judicial decree run the risk of severe sanctions. See *Maness v. Meyers,* 419 U.S. 449, 458 (1975). In *United States v. United Mine Workers,* 330 U.S. 258, 293 (1947), the Court held that the orderly administration of justice requires that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings."

Here, the Court of Appeals held that "a lawyer may not advise his client to violate a law or court order, except in the instance of a test case where there is a good faith belief that the statute or order may be invalid" (P.S.A. at 19). The Court concluded on the basis of clear and convincing evidence that Mr. Kerpelman had advised his client to seize a child from the custody of its mother in disregard of a court order. The Court further concluded that "this was no test case, nor did the custody order compel the surrender of any constitutional right" (P.S.A. at 19-20). Petitioner nevertheless contends that it is a denial of his First Amendment right to free speech for the Court to find that his counseling of a client to disregard a court order is a violation of the Disciplinary Rules for which sanctions may be imposed.

Petitioner's attempt to place his contumacious advice within the embrace of the First Amendment is to no avail. In *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978), the Court upheld disciplinary action taken against an attorney for engaging in the personal solicitation of clients in violation of the Disciplinary Rules. The Court concluded that the State's interest in protecting the lay public, given the potential for overreaching, was sufficient to permit the application of the Disciplinary Rules without offense to the First or Fourteenth Amendments to the Constitution. 436 U.S. at 468.

The interest of the State of Maryland in preventing attorneys, who speak as officers of the court, from advising their clients to disregard court orders and take the law into their own hands, is manifest. This was no test case, nor was there any constitutional right surrendered by virtue of the custody order. Mr. Kerpelman could have sought a court order altering the custody arrangement. Indeed, he had prepared and filed such a petition in this very matter. (See C.A. Op., P.S.A. at 5, 20). Instead of pursuing this lawful avenue, Mr. Kerpelman advised his client to engage in self-help which might well have resulted in harm to the child as well as to the adults involved — all in clear violation of a court order. Such conduct is not protected by the First Amendment even though speech was a component of the activity. See *Maness v. Meyers, supra;* and *Ohralik v. Ohio State Bar Association, supra.*

CONCLUSION

Respondent respectfully submits that for all of these reasons, Petitioner's claims that he has been denied rights guaranteed by the United States Constitution do not present any issue which warrants the issuance of a writ of certiorari by this Court to the Court of Appeals of Maryland.

Respectfully submitted,

HENRY J. MYERBERG
Assistant Bar Counsel
District Court Building
Taylor Avenue and Rowe Blvd.
Annapolis, Maryland 21401
Telephone: (301) 269-2791

M. PETER MOSER
ALAN I. BARON
1300 Mercantile Bank & Trust Bldg.
2 Hopkins Plaza
Telephone: (301) 547-0500

January 26, 1981